Supreme Court, U.S.
FILED

03 630 OCT 14 2003
No. 03-___

IN THE

Supreme Court of the United States

RONALD H. MANNING,
Petitioner,

v.

CHEVRON CHEMICAL COMPANY, LLC,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

VICTORIA L. PLANTE
Counsel of Record
5177 Richmond Avenue
Suite 1275
Houston, TX 77056
(713) 526-2615

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

79 pp

QUESTIONS PRESENTED

1. Whether a charging party's failure to attach the correct legal conclusion to the factual statement contained in a charge is a mere technical defect which may be amended after the filing period has expired.

2. Whether the time to file an EEOC charge for subsequent discriminatory acts is equitably tolled when a charging party detrimentally relies on the timeliness of an amended charge, federal regulations and case law, and the actions of the EEOC and employer.

PARTIES TO THE PROCEEDINGS

1. Ronald H. Manning, Petitioner

2. Victoria L. Plante, Attorney for Petitioner Ronald H. Manning

3. Chevron Chemical Company, LLC, Respondent

4. Holly Williamson of Littler Mendelson, P.C., Attorneys for Respondent Chevron Chemical Company, LLC

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Course of the Proceedings and Disposition Below	3
B. Statement of Facts	4
REASONS FOR GRANTING THE WRIT	9
SUMMARY	9
ARGUMENT AND AUTHORITY	10
I. THE COURTS OF APPEAL ARE DIVIDED ON WHETHER A CHARGING PARTY'S FAILURE TO ATTACH THE CORRECT LEGAL CONCLUSION TO THE FACTUAL STATEMENT CONTAINED IN A CHARGE IS A MERE TECHNICAL DEFECT WHICH MAY BE AMENDED AFTER THE FILING PERIOD HAS EXPIRED	10
II. THE RELATIONS BACK DOCTRINE IS CONSISTENT WITH THE STATUTORY AND REGULATORY PROVISIONS OF TITLE VII AND THE ADA.	12

TABLE OF CONTENTS—Continued

Page

III. THE TIME TO FILE AN EEOC CHARGE FOR SUBSEQUENT DISCRIMINATORY ACTS IS EQUITABLY TOLLED WHEN A CHARGING PARTY DETRIMENTALLY RELIES ON THE TIMELINESS OF AN AMENDED CHARGE, FEDERAL REGULATIONS AND CASE LAW, AND THE ACTIONS OF THE EEOC AND EMPLOYER 17

CONCLUSION 22

APPENDICES 1a

TABLE OF AUTHORITIES

CASES

Page

Alcom Electronic Exchange Inc. v. Burgess, 849 F.2d 964 (5th Cir. 1988). 10
Blumberg v. HCA Mgmt. Co., 848 F.2d 642 (5th Cir. 1988) 18
Davis v. Sodexho Cumberland College, 157 F.3d 460 (6th Cir. 1998) 10
Duggins v. Steak n Shake, 195 F.3d 828 (6th Cir. 1999) 11
Edelman v. Lynchburg College, 535 U.S. 106 (2002) 12, 16, 17
Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996) 11
Fairchild v. FormaScientific, Inc., 147 F.3d 567 (7th Cir. 1998) 11
Gonzalez-Aller Bakeyro v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir. 1983) 18
Holtz v. Rockerfeller & Co., 258 F.3d 62 (2nd Cir. 2001) 11
Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) 4, 10
Lawrence v. Cooper Communities, 132 F.3d 447 (8th Cir. 1998) 18
Love v. Pullman Co., 404 U.S. 522 (1971) 17, 19, 21
Manning v. Chevron Chemical Co., LLC, 332 F.3d 874 (5th Cir. 2003) 1, 13
Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992) 18
Morgan v. Washington Mfg., Co., 660 F.2d 710 (6th Cir. 1981) 18
National Railroad Passenger Corp. v. Abnermorgan, Jr., 536 U.S. 101 (2002) 13, 16
O'Shiver v. Levin, Fishbein, Sedren & Berman, 38 F.3d 1380 (3rd Cir. 1994) 18

TABLE OF AUTHORITIES—Continued

Page

Purrington v. Univ. of Utah, 996 F.2d 1025 (10th Cir. 1993) 20
Sanchez v. Conoco, Inc., 431 F.2d 455 (5th Cir. 1970) 4, 10, 15
Simms v. State of Oklahoma, 165 F.3d 1321 (10th Cir. 1999) 11
Waiters v. Robert Bosch Corp., 683 F.2d 89 (4th Cir. 1982) 18
Washington v. Kroger Co., 671 F.2d 1072 (8th Cir. 1982) 11
Zipes v. Trans World Airlines, 455 U.S. 385 (1981) 14, 17, 18, 19

STATUTES AND REGULATIONS

28 U.S.C. § 1254 (2003) 1
42 U.S.C. § 2000e-5(e)(1) (2003) 2, 12
42 U.S.C. § 2000e-5(b) (2003) 13, 14
42 U.S.C. § 12112 (2003) 3
42 U.S.C. § 12117(a) (2003) 2, 12
29 C.F.R. § 1601.12(a) (2003) 14
29 C.F.R. § 1601.12(b) (2003) 2, 10, 15
29 C.F.R. § 1601.21(b)(1) (2003) 2, 5

MISCELLANEOUS

Black's Law Dictionary (6th Ed. 1990) 21

IN THE

Supreme Court of the United States

No. 03-___

RONALD H. MANNING,

Petitioner,

v.

CHEVRON CHEMICAL COMPANY, LLC,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Manning v. Chevron Chemical Company, LLC*, is reported at 332 F.3d 874 (5th Cir. 2003). *Appendix B*. The opinion of the court of appeals denying the Petition for Rehearing En Banc is published at 2003 U.S. App LEXIS 15387. *Appendix A*.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 13, 2003. *Appendix B*. The decision denying the Petition for Rehearing En Banc was entered on July 15, 2003. *Appendix A*. This Petition for Writ of Certiorari is filed within 90 days of the entry of that order. This Court has jurisdiction to hear this matter under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. 2000e-5(e)(1) states in relevant part, "a charge shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred."

42 U.S.C. 12117(a) provides in relevant part, "the powers, remedies and procedures set forth in . . . the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) shall be the powers, remedies, and procedures this title provides to the Commission, Attorney General or to any other person alleging discrimination on the basis of disability in violation of any provision of this act . . . concerning employment."

29 C.F.R. § 1601.12(b) provides in part, ". . . a charge is sufficient when the commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received."

29 C.F.R. § 1601.21(b)(1), provides in part, "in cases where the Commission decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is

true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not receive a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. . . . After reconsideration the Commission will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the Commission will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit."

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition Below

This is a race, gender, disability and retaliation lawsuit brought by Ronald H. Manning ("Petitioner") against Chevron Chemical Company, LLC ("Respondent"), after the Equal Employment Opportunity Commission ("EEOC") issued a right to sue on November 26, 1999. *Appendix E.* This action was timely filed in the United States District Court for the Eastern District of Texas, Beaumont Division pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 et seq. ("Title VII"), and the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12112 et seq.

The court granted summary judgment on all of Petitioner's claims. *Appendix C.* Following entry of the final judgment on September 10, 2001, Petitioner timely filed his notice of appeal on October 5, 2001.

The United States Court of Appeals for the Fifth Circuit affirmed the district court decision. Petitioner timely filed a Petition for *En Banc* Rehearing because the panel decision

directly contradicted Fifth Circuit precedent on amended charges of discrimination. *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985); and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970). Petitioner also requested correction or amendment of the opinion.[1] The court denied this request as well as the request for rehearing *en banc* on July 15, 2003.

Petitioner timely filed this Petition for Writ of Certiorari on October 14, 2003.

B. Statement of Facts

Petitioner was denied promotion to two T-1 positions on June 16, 1998. As a result, Petitioner timely filed an EEOC charge of discrimination in or about October 1998. In his charge, Petitioner alleged that Respondent had retaliated against him for prior claims of discrimination and discriminated against him because of his race and gender.

The EEOC accepted his charge and began its investigation. In a letter to the EEOC dated December 14, 1998, Respondent responded to Petitioner's charge. In this letter, Respondent concentrated on Petitioner's alleged performance during the oral interview. Specifically, Respondent claimed Petitioner tended to "ramble" and "repeat himself" when answering interview questions. Additionally, it claimed that Petitioner's skills articulated during the oral interview were not as strong as selected candidates, Noyes and Williams.[2] To support the reason for its decision, Respondent provided the EEOC with copies of the Candidate Evaluation Forms for Noyes, Williams, and Petitioner. On Petitioner's form, it read

---

[1] The appellate opinion contains material incomplete and inaccurate statements of fact to support the court's rationale.

[2] As its legitimate non discriminatory reason, Respondent stated that Noyes and Williams were the "best qualified candidates" based on the oral interviews.

"AMERICAN DISABILITY ACT - STUTTERER."[3] In or about July 1999, the EEOC provided Petitioner with a copy of Respondent's letter with attached documents in or about July 1999. Manning also received an EEOC right to sue notice in July 1999.

On September 27, 1999, Manning for the first time consulted with an attorney about the EEOC claims and right to sue notice. At that time, Petitioner retained Victoria Plante ("Attorney Plante"), as his attorney to file a lawsuit against Respondent for retaliation and race and gender discrimination. During the initial consultation, Attorney Plante noticed Petitioner's severe stuttering disability and speech impediment. Attorney Plante also reviewed the documents and response letter Respondent submitted to the EEOC. Based on this information, Attorney Plante promptly notified the EEOC of a potential violation of the Americans with Disabilities Act (ADA) by telephone on September 29, 1999, based on information obtained during the EEOC investigation. One day later, Attorney Plante sent a letter dated September 30, 1999, to the EEOC District Director H. Joan Ehrlich and requested that Petitioner be allowed to amend his charge to include a disability discrimination claim for denial of the T-1 positions. Specifically in her letter, Attorney Plante alerted the EEOC that Respondent had provided this information during the investigation period that revealed possible violations of the ADA. *See Appendix E* at 49a.

The EEOC received this letter on October 1, 1999, and promptly responded. On October 6, 1999, acting under the authority of Section 1601.21(b)(1) of the EEOC's Procedural

---

[3] The record of appeal reflects Respondent became aware of Petitioner's stuttering problem as early as 1977 when Petitioner first interviewed with the company. The interviewer made notes regarding Petitioner's stuttering problem.

Regulations, the EEOC District Director vacated and revoked the Dismissal and Notice of Rights dated July 9, 1999. The EEOC advised the Respondent and Petitioner that it would continue the investigation and issue a Dismissal and Notice of Rights anew which would provide the Petitioner with 90 days within to bring suit in accordance with EEOC Regulation 1601.28. *Appendix E* at 47a.

The EEOC continued the investigation that included a disability discrimination allegation for denial of the 1998 T-1 positions. In a letter to Respondent dated October 28, 1999, the EEOC requested additional information related to the amended charge. *Appendix E* at 45a. Respondent responded to the request in a letter dated November 15, 1999. *Appendix E* at 43a. Petitioner formally amended his charge with verification on November 20, 1999, adding the allegation of disability discrimination.[4] *Appendix E* at 41a.

After the continued investigation of the disability claim; Petitioner was issued a new Dismissal and Notice of Rights on November 26, 1999. *Appendix E* at 38a. The notice provision stated Petitioner could bring a lawsuit in federal court for retaliation, race, gender and disability discrimination within 90 days. More importantly, under the reasons given for dismissing Petitioner's charge, the EEOC did not select the reason which states, "[y]our charge was not timely filed with the Commission, .i.e., you waited too long after the date(s) of the discrimination alleged to file your charge. Because it was filed outside the time period prescribed by law, the Commission cannot investigate your allegations." *Appendix E* at 38a.

In reliance on this notice, Petitioner timely filed his lawsuit on February 22, 2000, in the United States District Court for

---

[4] While requesting an amendment to his charge orally on September 29, 1999, and in writing on September 30, 1999, the charge was not formally amended until November 20, 1999, due to administrative delay.

the Eastern District of Texas, Beaumont Division, alleging retaliation and discrimination on the basis of race, gender and disability for denial of promotion to the T-1 positions.

Approximately three (3) months after Petitioner filed suit, Respondent informed Petitioner that he would be terminated as a result of a reduction in force effective September 1, 2000. Petitioner requested transfer to approximately 14 lateral positions available at other neighboring Chevron facilities. In or about June 2000, personnel at Chevron's Cedar Bayou facility (Nethery and Meeks) interviewed Respondent for some of the lateral positions. During the interview, Nethery wrote discriminatory notes regarding Respondent's speech and performance during the interview. Nethery noted Respondent was "very slow talking; rambles, mental focus seem off and slow; acts 20 years (or more) older than he is!; uh, uh, uh . . . let's see; sleepy and bewildered looking." Based on the interview, Petitioner was notified of July 18, 2000, that he did not receive any of the Cedar Bayou positions.

The discriminatory notes were produced by Respondent during litigation in or about November 2000. Based on these notes, in December 2000, Petitioner filed a motion for leave of court to amend his complaint to include disability discrimination for denying him transfer to the Cedar Bayou positions.[5] Respondent did not file a response in opposition to Petitioner's motions for leave to add an additional

---

[5] As background, Manning filed three motions for leave to amend his complaint. The first motion was filed and granted in June 2000, to correct clerical and contextual defects in the pleadings. The second motion was filed and granted in August 2000, after Respondent was informed that he had not received any of the transfer positions at neighboring facilities (Cedar Bayou and Kingwood) because of retaliation. The third motion was filed and granted in or about December 2000 and January 2001. The third amended complaint alleged disability discrimination for the denial of Cedar Bayou transfer positions in July and November 2000.

disability allegation for the Cedar Bayou positions. Petitioner took the depositions of Nethery and Meeks and specifically questioned them regarding Petitioner's stuttering problem during the oral interview for the Cedar Bayou positions.

On March 26, 2001, Respondent moved for summary judgment but *did not* address or request summary judgment on the disability discrimination claim for the Cedar Bayou positions. Due to discovery delays, on May 25, 2001, Petitioner timely responded to the summary judgment motion specifically argued against summary judgment based on the discriminatory notes and the deposition testimony of Nethery and Meeks.

For the first time on June 5, 2001, Respondent alleged that Petitioner had failed to exhaust his administrative remedies on the disability claim for the Cedar Bayou positions.[6] Petitioner responded to Respondent's affirmative defense during oral argument on June 14, 2001. At the completion of oral argument, the court granted summary judgment on all Petitioner's disability and retaliation claims and took under advisement Petitioner's race and gender claims for the T-1 positions. As a result of the oral ruling of the court that the disability claim was time barred, Petitioner, as precaution, filed a new charge of disability discrimination with the EEOC in July 2001 for denial of the Cedar Bayou positions. On September 7, 2001, the court granted Respondent summary

---

[6] Prior to May 15, 2001 (which is 300 days after Petitioner was notified that he had not received three Cedar Bayou positions), Respondent did not raise this defense in its summary judgment motion filed on March 26, 2001, because Petitioner, as precaution, would have simply filed a new EEOC charge for a disability claim for the Cedar Bayou positions. At the lower level, Petitioner alleged that in failing to raise failure to exhaust administrative remedies for the Cedar Bayou positions in its summary judgment motion or any other pleading, Respondent waived it. The lower courts did not address this issue in their opinions.

judgment on the remainder of Petitioner's claims. Petitioner timely appealed.[7]

REASONS FOR GRANTING THE WRIT

Summary

The writ should be granted because:

1) The Courts of Appeal are divided on whether an amended charge alleging a different type of discrimination relates back to the filing date of the original charge;

2) Any rules prohibiting amended charges alleging a different type of discrimination after the filing period is inconsistent with federal statute and regulation;

3) Without review, a charging party's rights will be cut off when, after the filing deadline, the EEOC investigation reveals another type of discrimination not alleged in the original charge;

4) Charging parties' rights should not be affected because they do not attach correct legal conclusions to the factual statement in their charges; and

5) This Court must articulate the circumstances under which lowers courts may apply equitable tolling or estoppel to promote uniformity among the circuits and to deter abuse of discretion.

---

[7] After granting summary judgment, the EEOC dismissed the July 2001 disability charge based on the district court's summary judgment. Within 90 days, Petitioner timely filed another lawsuit pro se' in January 2002, after receiving his right to sue for his disability claim. The district court dismissed the complaint concluding Petitioner's disability claim was subject to res judicata and thereby barred. Thereafter, the district court imposed sanctions against Petitioner for filing the second lawsuit. In order to protect his rights in case of reversal of summary judgment, Petitioner took precaution to protect his claim, to no avail.

ARGUMENT AND AUTHORITY

I. THE COURTS OF APPEAL ARE DIVIDED ON WHETHER A CHARGING PARTY'S FAILURE TO ATTACH THE CORRECT LEGAL CONCLUSION TO THE FACTUAL STATEMENT CONTAINED IN A CHARGE IS A MERE TECHNICAL DEFECT WHICH MAY BE AMENDED AFTER THE FILING PERIOD HAS EXPIRED.

Courts of Appeal have struggled with the issue of whether an amended charge alleging a different type of discrimination relates back to the date of the original charge. The reason for the conflict among the courts of appeal is each circuit's interpretation of the federal regulation 29 C.F.R. § 1601.12 (b). Some courts have interpreted this regulation to mean that a charge alleging a different legal conclusion after the filing deadline is amendable and relates back to the original filing date so long as the facts included in the original and amended charges are the same or similar. *See Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985)(affirming *Sanchez's* holding that the amended charge related back to the original charge because the facts alleged in both charges were identical); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1979) (holding that the selection of the type of discrimination alleged, i.e. the selection of which box to check, is in reality nothing more than a legal conclusion to the facts alleged and thereby related back to the date of the original charge);[8] *See also Davis v. Sodexho Cumberland College*, 157 F.3d 460, 463-64 (6th Cir.1998)(analyzing

---

[8] In this case, the lower courts' opinions directly conflict with prior precedent in *Sanchez* and *Hornsby*. Typically where there is conflict in authority, the older rule controls. *Alcom Electronic Exchange Inc. v. Burgess*, 849 F.2d 964, 967 (5th Cir. 1988). Moreover, *Sanchez* is a better well-reasoned opinion based on the interpretation of the statute and regulation at issue.

Sanchez and concluding when the EEOC investigation of one charge in fact reveals evidence of a different type of discrimination against the plaintiff, a lawsuit based on the newly understood claim will not be barred); *Duggins v. Steak n Shake*, 195 F.3d 828, 833 (6th Cir. 1999)(holding a lay complainant should not be precluded from bring suit because of the failure to attach the correct legal conclusion); and *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-76 (8th Cir. 1982)(concluding where an aggrieved person is a non-lawyer who may be unaware of the true basis for the allegedly discriminatory acts until after an investigation is made, a lawsuit that alleges a basis different from that alleged at the EEOC level will not be time-barred).

Yet others courts have held that an untimely amended charge alleging a different type of discrimination does not relate back unless the amendment "relates or grows out of" the original charge of discrimination. *See Holtz v. Rockerfeller & Co.*, 258 F.3d 62, 83-84 (2d Cir. 2001)(holding that an unsworn claim made more than a year after the original charge was filed was barred unless it was reasonably related to the allegations in the original charge); *Simms v. State of Oklahoma*, 165 F.3d 1321, 1326 (10th Cir. 1999)(barring the amended charge of retaliation because the original charge of race discrimination contained a theory of recovery and did not mention retaliation or facts supporting such a claim); *Fairchild v. FormaScientific, Inc.*, 147 F.3d 567, 575-76 (7th Cir. 1998)(declining to follow *Sanchez* and concluding that an untimely amendment alleging an entirely new theory or recovery does not relate back to a timely filed original charge); and *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996)(concluding that an amended age discrimination charge does not necessarily flow from sex discrimination and vice versa).

The major problem with cases opposing late amendments alleging a different type of discrimination is the interpretation

of the regulation. This Court must ensure that lower courts' interpretation is consistent with federal law.

II. THE RELATIONS BACK DOCTRINE IS CONSISTENT WITH THE STATUTORY AND REGULATORY PROVISIONS OF TITLE VII AND THE ADA.

The Supreme Court recently interpreted the charge statute and the validity of the EEOC regulation governing amendments in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). While not specifically addressing whether late amendments to allegation of discrimination relate back to the original filing date, this Court held that there was nothing plain in the reading of the "charge" provision to prohibit verification of a charge after the filing period. *Id.* In concluding that the amended charge related back to the original filing date, this Court considered: 1) the plain meaning of Title VII filing requirements; 2) the validity of the EEOC regulation allowing amendments; and 3) the congressional purpose and intent of Title VII. Likewise, this court should review allegation amendments received after the filing period using the same considerations.

The charge provision of the ADA (incorporating Title VII) states in part, "a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . ." 42 U.S.C. § 2000e-5(e)(1) and 42 U.S.C. § 12117.

There is no dispute that Petitioner filed his original charge alleging retaliation, and race and gender discrimination within 300 days, as required by Texas. The dispute arises as to the timeliness of his amended charge alleging disability discrimination more than 300 days after denial of the T-1 positions. While acknowledging a narrow exception for amended charges, the court of appeal declined to follow its prior holdings in *Sanchez* and *Hornsby*. In concluding that Petitioner could not amend his charge after 300 days, the court reasoned that the issue was not whether an employee adds facts when adding an allegation (as Petitioner argued), but whether the employee included sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination. *Manning* at 879. This conclusion is inconsistent with the statute and regulation governing original and amended charges. The only notice requirement by statute is that the EEOC's notice to the employer include "the date, place and circumstances of the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b). This Court has recently stated an "unlawful employment practice" is a discrete act such as termination, failure to promote, denial of transfer, or refusal to hire. *National Railroad Passenger Corp. v. Abnermorgan, Jr.*, 536 U.S. 101, 114 (2002). Notice of the specific allegation is not required by statute. As long as the charge explains the facts related to the unlawful employment practice or discrete act, it is deemed sufficient.[9]

For the sake of argument, even if the original charge had to include "the requisite notice" of the specific type of discrimination (or at the very least facts "sufficient" to put the employer on notice of an additional allegation), as the appeals court has held, Petitioner's charge would still be amendable

---

[9] Arguably, the filing of a "Charge of Discrimination" implies some form of discrimination. Thus, the employer has knowledge that the employee is alleging some form of discrimination.

after the filing deadline because Respondent provided documents to the EEOC during the original investigation period that proved Respondent had actual notice of a potential disability allegation. *See Appendix E* at 49a. Boldly printed on Petitioner's T-1 Candidate Evaluation Form is the phrase "Americans Disabilities Act-Stutterer." Nevertheless, when balancing the notice requirement with the remedial purpose of Title VII, this Court has chosen to honor the remedial purpose of legislation. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1981).

The court in *Manning* as well as other courts of appeal courts have erroneously interpreted the law governing original and amended charges. The statute provides, "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). Congress has empowered the EEOC with rule-making authority on the content of the charge. The applicable EEOC regulation provides: "each charge *should* contain the following: (1) the full name, address and telephone number of the person making the charge except as provided in § 1601.7; (2) the full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent); (3) a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: *See* § 1601.15(b); (4) if known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and (5) a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency." 29 C.F.R. § 1601.12(a).

Petitioner's original and amended charges clearly included the statutory requirements and the recommended regulation information. *Appendix E* at 49a.[10]

Notwithstanding a charging party's failure to provide information in 29 C.F.R. § 1601.12(a), a charge is sufficient when the Commission receives from the person making the charge, a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. 'Such amendments' *and* 'amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.'" 29 C.F.R. § 1601.12(b).

By definition, "amplify"means to enlarge, increase, enhance or expand. An "allegation" is an unproven belief. In the amended charge, Petitioner simply enlarged or expanded his belief that Respondent had discriminated against him because of his disability when it denied him promotion to the T-1 positions. This amplified allegation is to relate back to the original filing date based on the plain meaning and reading of the statute. As the court correctly held in *Sanchez*, the regulation sentence, "a charge may be amended to cure technical defects or omissions, including failure to swear to the charge or to clarify and *amplify allegations* made therein, and such amendments relate back to the original filing date," includes allegations that have not been checked on the EEOC Charge of Discrimination Form so long as the original amended charge facts are the same. *Sanchez* at 462.

---

[10] The original charge included all information in the amended charge, except "IV. I wish to amend this charge to include being denied promotion because of my disability, as defined by, and covered under, the Americans with Disabilities Act."

Still, other courts have often misinterpreted the amended charge regulation. They have compounded "amendments relating the verification, clarification and amplification" with the "amendments relating to additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." However, the plain reading of the regulation supports two types of amendments: 1) amendments to cure technical defects and omissions (such as verification, amplification and clarification) in the original charge; *and* 2) amendments that alleged different acts which constitute unlawful employment practices related to or growing out the subject matter of the original charge. Under the first, as long as the facts are the same or similar, the charging party may amend after the filing deadline. It merely attached a different legal conclusion to the same set of facts. Under the second, the amendment alleging "additional acts" must be related to or growing out of the subject matter of the original charge. For example, an original charge based on a denial of a promotion due to gender could not be amended after the filing period to include a denial of a transfer due to age, unless the age claim for the transfer could independently satisfy the filing requirement. This makes sense because the 180 or 300 day time period begins to run when the employee is a victim of an adverse act (i.e. promotion denial, transfer, termination, etc.). *See National Railroad Passenger Corp. v. Abnermorgan, Jr.*, 536 U.S. 101, 110 (2002).

Much like the reasoning in *Sanchez*, this Court in *Edelman* concluded that charging parties are not cut off from remedies available to them simply because the charge was not verified or failed to attach the correct legal conclusion. *See Edelman* at 115 and *Sanchez* at 464. Both cases were also consistent with the legislative intent and purpose of Title VII. In *Edelman*, this Court stated that Congress presumably did not mean to affect the nature of Title VII as a remedial scheme in which layperson, rather than lawyers, are expected to initiate the process. *Edelman* at 115. The Court also adopted the

EEOC amendment regulation as reasonable and consistent with the Title VII statute. *Id.* at 114. Additionally, this Court has declined to adopt a strict interpretation of technical rules in a statutory scheme in which laypersons, rather than trained lawyers initiate a process. *See Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1971).

In this case, Petitioner was not assisted by counsel when the original charge was prepared and filed in or about October 1998. *See Appendix E* at 42a. After Petitioner met with an attorney in September 1999 he, through his attorney, immediately notified the EEOC of potential ADA violations. *See Appendix E* at 49a. When his attorney alerted the EEOC of documents relating to an ADA violation in its investigation file for the original charge, EEOC took immediate action and revoked the dismissal and notice of rights pursuant to 29 C.F.R. § 1601.21(b)(1). *Appendix E* at 47a.

Clearly, based on the law and facts, Petitioner's disability allegation related back.

III. THE TIME TO FILE AN EEOC CHARGE FOR SUBSEQUENT DISCRIMINATORY ACTS IS EQUITABLY TOLLED WHEN A CHARGING PARTY DETRIMENTALLY RELIES ON THE TIMELINESS OF AN AMENDED CHARGE, FEDERAL REGULATIONS AND CASE LAW, AND THE ACTIONS OF THE EEOC AND EMPLOYER.

Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that like a statute of limitation, is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans Work Airlines, Inc.*, 455 U.S. 385, 393 (1981). The Supreme Court has not specifically addressed the circumstances under which equitable tolling may be appropriate. It has allowed the lower courts to make equitable tolling determinations on a case by case basis. As a result, lower court rules have no uniformity which provides fertile ground for courts to abuse their discretion.

Circuit and district courts have varying guidelines for equitable tolling/estoppel in employment discrimination cases. The Third and Fifth Circuits have identified three bases for equitable tolling: 1) the pendency of a suit between the parties in the wrong forum; 2) the plaintiff's lack of awareness of facts support his claim because defendant's intentional concealment of them; and 3) the EEOC misleading the plaintiff about his rights. *Oshiver v. Levin, Fishbein, Sedren, & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994); *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988). The Tenth Circuit tolls the time period where a plaintiff has been lulled into inaction by an employer, state or federal agencies or the courts. *Gonzalez-Aller Bakeyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983). The Eighth Circuit applies equitable tolling for excusable neglect which may or may not be attributable to the defendant. *Lawrence v. Cooper Communities*, 132 F.3d 447, 451 (8th Cir. 1998). The Sixth Circuit employs equitable tolling where a charging party timely asserts his right in the wrong forum. *Morgan v. Washington Mfg., Co.*, 660 F.2d 710 (6th Cir. 1981). The Fourth Circuit finds equitable tolling appropriate where the EEOC failed to take action on a charge. *Waiters v. Robert Bosch Corp.*, 683 F.2d 89, 92 (4th Cir. 1982). The Eleventh Circuit has applied equitable tolling where the employer promised to remedy the discrimination. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

While this Court has recently stated equitable tolling is to be applied sparingly where a party attempts to gain access to the court out of vague sympathy for particular litigants, there are still circumstances that warrant equitable tolling. *See Zipes*.

Here, Petitioner filed a charge of disability, race, gender discrimination and retaliation in November 1999. *Appendix E* at 41a. This case poses a unique situation because the cases

cited for equitable tolling were cases where the litigants either failed to file an EEOC charge or their EEOC charge was untimely. This is not the case here. Petitioner was not required to re-file a new charge of disability discrimination once he received a dismissal and right to sue under Title VII and the ADA. *Appendix E* at 39a.. It is well established law that after Petitioner files an EEOC charge of discrimination, there is no need to re-file for subsequent acts of discrimination related to allegations made in the prior charge. *See Love*, 404 U.S. at 526 (affirmed by *Zipes*, 455 U.S. at 397). To require a second "filing" by an aggrieved party after termination of a state proceeding would serve no purpose other than the creation of another procedural technicality. *Love* at 526.

The parties agree that Petitioner was not required to re-file a charge of retaliation after being denied the Cedar Bayou and Kingwood transfer positions on July 18, 2000.[11] However for the first time on June 8, 2001, Respondent argued that Manning failed to exhaust his administrative remedies on the disability claim for denial of the Cedar Bayou transfer positions in July 2000 and later in November 2000. Because Respondent failed to seek summary judgment or dismissal on the disability claim for the Cedar Bayou position on March 25, 2000, it waived it.[12] One reason for the delay in waiting until June 8, 2001 to assert this defense was because Petitioner's 300 filing period would expire, based on Respondent's calculations, May 15, 2001. On June 14, 2001,

---

[11] On August 22, 2000, Petitioner amended his complaint to include a retaliation claim for denial of the Cedar Bayou and Kingwood transfer positions in July 2000. He did not re-file a charge with the EEOC for the transfer denials.

[12] March 26, 2001 was the deadline for Respondent to file all dispositive motions at the district court level.

the court dismissed as untimely all of Manning's disability claims.[13]

Petitioner also took immediate action upon learning of Respondent's new defense and the adverse district court ruling. Petitioner promptly filed his claim with the EEOC alleging discrimination for the denial of the Cedar Bayou positions filled in July 2000 and November 2000. While disputed, based upon deposition testimony, the three candidates that Respondent selected in July 2000 did not accept the Cedar Bayou positions. These positions remained opened until November 2000 when these positions were filled by additional candidates. Petitioner was not offered these positions at that time. Thus, Petitioner filed a charge claiming discriminatory acts occurring in July 2000 and November 2000. However upon notice of the district court's final judgment dismissing Petitioner's entire lawsuit, the EEOC dismissed Petitioner's July 2001 disability charge citing "court decision" as its reason. From this notice, Petitioner timely filed a lawsuit pro se' in January 2002 on the disability claim for the Cedar Bayou positions. Upon motion by Respondent, the district court dismissed Petitioner's lawsuit based on res judicata and imposed sanctions against him.[14]

Clearly, Petitioner met, if not exceeded, the standard for equitable tolling. He did not abandon or neglect his disability claim for the Cedar Bayou positions. His attorney reasonably

---

[13] Responding to Respondent's untimely defense for the Cedar Bayou disability claim, on June 14, 2001, Petitioner, in the alternative, argued equitable tolling and waiver during oral argument, to no avail.

[14] By the time Petitioner filed the second suit on the Cedar Bayou disability claim, the first lawsuit was pending on appeal to the U.S. Court of Appeals for the Fifth Circuit. Petitioner exercised due diligence in protecting his claims in case of reversal. *See Purrington v. University of Utah*, 996 F.2d 1025, 1031 (10th Cir. 1993). Yet he was sanctioned for doing so.

relied on case precedent in *Sanchez* as well as the EEOC's action after Petitioner filed the disability discrimination amendment in November 1999. *See Appendix E* at 38a-47a. As such, there was no reason to re-file another EEOC charge alleging disability discrimination prior to filing suit. The amended charge should have sufficed for subsequent acts of disability discrimination, including the Cedar Bayou transfer positions. *See Love* at 526.

Respondent should not be rewarded for its conduct in: 1) failing to object to and allowing discovery related to the Cedar Bayou disability claim; 2) failing to oppose complaint amendments based entirely on the Cedar Bayou disability claim; 3) failing to timely file a dispositive motion on the Cedar Bayou position; and 4) failing to specifically assert failure to exhaust administrative remedies for the Cedar Bayou disability claim in its Third Amended Answer, so Petitioner would have notice. Based on Respondent's action or inaction, Petitioner's time should have been tolled and Respondent should be equitably estopped from asserting this defense.

The term "equity" denotes the spirit or habit of fairness, justness and right dealing which would regulate the intercourse of men. Black Law Dictionary, (6th Ed. 1990). As such, Petitioner should be allowed, at the very least, to continue his disability discrimination claim for denial of the Cedar Bayou positions.

CONCLUSION

For the reasons stated in this petition, Petitioner, Ronald H. Manning, respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

VICTORIA L. PLANTE
Counsel of Record
5177 Richmond Avenue
Suite 1275
Houston, TX 77056
(713) 526-2615

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed July 15, 2003]

No. 01-41222

RONALD H. MANNING,
Plaintiff-Appellant,

v.

CHEVRON CHEMICAL COMPANY LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont.

ON PETITION FOR REHEARING EN BANC

Before: HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, *Circuit Judges.*

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Emilio M. Garza
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 13, 2003]

No. 01-41222

RONALD H. MANNING,
Plaintiff-Appellant,

versus

CHEVRONCHEMICAL COMPANY LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

OPINION

Before: HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, *Circuit Judges*.

Ronald H. Manning ("Manning") appeals the district court's grant of summary judgment in favor of Chevron Chemical Company, LLC ("Chevron"). Manning filed this employment discrimination lawsuit against Chevron, claiming that the company discriminated against him on the basis of his race, gender, and disability, and retaliated against him for seeking redress for these alleged wrongs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"). We

conclude that the district court properly granted Chevron's motion for summary judgment, and therefore affirm.

I

For approximately 23 years, *Manning*, an African American male, worked at a Chevron facility in Orange, Texas. In 1998, *Manning* applied for a promotion to the position of Technician 1 ("T-1"). Chevron decided not to promote *Manning*, and instead selected Peggy Williams (an African American female) and Fred Noyes (a Caucasian male) for the two open positions.

On October 26, 1998, after learning that he was not selected for a T-1 position, *Manning* filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging race and gender discrimination as well as retaliation.[1] Manning did not check the box labeled "disability" (for an allegation of disability discrimination) on that original charge.

Manning subsequently consulted an attorney about his case. The attorney noticed that *Manning* had a tendency to stutter as he spoke, and suggested that *Manning* might also have a disability discrimination claim. At his counsel's suggestion, on November 20, 1999, *Manning* amended his charge of discrimination to include an ADA claim. He then filed the instant lawsuit, raising race, gender, disability, and retaliation claims for Chevron's failure to promote him to a T-1 position.

---

[1] *Manning* explained the basis for the retaliation claim when he filed his federal complaint: Manning had previously brought employment discrimination actions against Chevron, and he believed that the company failed to promote him to retaliate against him for having filed those prior lawsuits.

A few months later, Chevron began reorganizing its workforce[2] and informed *Manning* that he was among the employees who might be terminated during this process. Chevron offered *Manning* (along with many of the other employees facing layoff) the opportunity to apply for positions at other Chevron facilities. *Manning* subsequently applied for transfers to the Cedar Bayou Chemical Plant and the Kingwood technology facility. *Manning* did not obtain a position at either location. As a result, he amended his federal complaint against Chevron to include disability discrimination and retaliation claims for the company's failure to transfer him.

Chevron offered most of the employees facing layoff a severance package valued at approximately $45,000.00. Chevron informed *Manning* that, in order to receive the package, he would have to sign a release form, waiving all claims against the company. *Manning* refused to sign the release and did not receive any severance pay. *Manning* alleged in his federal lawsuit that Chevron's failure to provide him with the severance package was another instance of retaliation.

The district court found that *Manning* had failed to raise a genuine issue of material fact as to any of his race, gender, or retaliation claims. The court also concluded that *Manning's* disability discrimination claim regarding the T-1 position was time-barred, because *Manning* had failed to file a timely charge of disability discrimination with the EEOC. Therefore, the district court granted Chevron's motion for summary judgment.

On appeal, *Manning* contends that (1) his ADA claim regarding the T-1 position is not time-barred; (2) even if that first ADA claim is time-barred, his additional disability dis-

---

[2] The reorganization was precipitated by a merger of Chevron and Phillips Petroleum.

crimination claim (regarding the Cedar Bayou transfer positions) is subject to equitable tolling; (3) Chevron engaged in race and gender discrimination when it failed to promote *Manning* to the T-1 position; and (4) Chevron's failure to transfer him and its refusal to award him the severance package constituted retaliation. We address each claim in turn.

II

We review the district court's ruling on a motion for summary judgment de novo, applying the same legal standard as the district court. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 408 (5th Cir. 2002). Summary judgment should be granted only when there is "no genuine issue as to any material fact [ ]" FED. R. CIV. P. 56(c); *Wyatt*, 297 F.3d at 408-09. An issue of fact is material only "if its resolution could affect the outcome of the action." *Wyatt*, 297 F.3d at 409.

In determining whether there is a dispute as to any material fact, we consider all of the evidence in the record, but we do not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Instead, we "draw all reasonable inferences in favor of the nonmoving party[.]" *Id.*; *Wyatt*, 297 F.3d at 409. If we determine, after giving credence to the facts as presented by the nonmoving party, that "the moving party is entitled to a judgment as a matter of law," we affirm the grant of summary judgment. FED. R. CIV. P. 56(c). The district court found that *Manning's* disability discrimination claim regarding the T-1 position was untimely. As the district court recognized, under the ADA, *Manning* had to file a charge of discrimination within 300 days of the alleged discriminatory act. *See* 42 U.S.C. § 12117 (incorporating 42 U.S.C. § 2000e-5(e)). The limitations period began to run from the time *Manning* "[knew] or reasonably should have known that the challenged act [had] occurred." *Vadie v. Miss. State Univ.*, 218 F.3d 365, 371 (5th Cir. 2000).

Manning learned that he did not receive the T-1 position on June 16, 1998. He had 300 days from that date (or until April 12, 1999) to file his charge of discrimination. *Manning* did file a timely charge on October 26, 1998, but that charge alleged only race, gender, and retaliation claims. *Manning* did not amend his charge to include an ADA claim until November 20, 1999, after the expiration of the 300-day period. As a result, the district court concluded that his disability discrimination claim was untimely.

Manning argues that the district court erred in holding that his ADA claim was time-barred. He contends that the court should have found that his amended charge, alleging disability discrimination, "relates back" to the date of his (timely filed) original charge.

As *Manning* appears to recognize, EEOC regulations allow a claimant to amend a charge of discrimination to "cure technical defects or omissions" or to "clarify and amplify" the initial allegations. 29 C.F.R. § 1601.12(b). If the amendments involve acts that "relate[] to or grow[] out of the subject matter of the original charge," the amendments will "relate back to the date the charge was first received." *Id.*; *see* 29 C.F.R. § 1626.8(c). *Manning* contends that his amendment, which added a disability discrimination claim, is sufficiently related to the subject matter of his original charge (*i.e.*, his race, gender, and retaliation claims) to "relate back" to the date of his original charge. As a result, he claims, his disability discrimination claim should be deemed timely.

Generally, amendments that raise a new legal theory do not "relate back" to an original charge of discrimination. *See, e.g.*, *EEOC v. Miss. Coll.*, 626 F.2d 477, 483-84 (5th Cir. 1980) (observing that "because [the claimant's] allegations of racial discrimination do not relate to or grow out of the allegations of sex discrimination advanced in the original charge, that aspect of the amended charge does not relate back to the time of filing of [the] original charge"); *Simms v.*

Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1327 (10th Cir. 1999) (holding that the plaintiff's amended charge did not relate back under § 1601.12(b), because the original charge alleged only race discrimination, while the amended charge included "a new theory of recovery"—retaliation); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) ("An untimely amendment that alleges an entirely new theory of recovery does not relate back to a timely filed original charge."); *id.* at 576 (concluding that an amendment containing a claim of disability discrimination did not relate back to the original charge, which alleged age discrimination); *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 963-64 (4th Cir. 1996) (holding that the plaintiff's age discrimination claim did not relate back to the originally filed charge of sex discrimination).

This rule has an important policy justification. One of the central purposes of the employment discrimination charge is to put employers on notice of "the existence and nature of the charges against them." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77, 80 L. Ed. 2d 41, 104 S. Ct. 1621 (1984). In order to adequately notify employers about the nature of the charges against them, employees must inform their employers from the outset about their claims of discrimination. *See Simms*, 165 F.3d at 1327 ("Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period—giving the employer notice and providing opportunity for administrative investigation and conciliation."); *Fairchild*, 147 F.3d at 575 ("The charge filing requirement ensures that the employer has adequate notice of the charges and promotes conciliation at the administrative level.").

Despite the important policy justifications for requiring employees to assert all of their claims in the original charge, we have identified one very narrow exception to this general

rule. We have held that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge when the facts supporting both the amendment and the original charge are essentially the same. See *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (concluding that the plaintiff's amendment, which alleged gender discrimination, related back to the age and retaliation claims in her original charge, because the factual allegations in the original charge included a reference to gender discrimination); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-64 (5th Cir. 1970) (concluding that the plaintiff could add a national origin discrimination claim to the gender discrimination claim in her original charge).

Manning contends that his case fits under our exception. He asserts that, when he amended his original charge to include a disability discrimination claim, he "did not allege new and/or additional facts to support his amended disability claim." *Manning* appears to assume that, under our cases, an employee can amend his charge of discrimination at any point to allege a new theory of recovery, as long as the employee does not allege any new facts in the amended charge.

Manning misunderstands the import of our precedent. The issue is not whether the employee adds any facts when he amends his charge of discrimination. Instead, the question is whether the employee already included sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination. *See Hornsby*, 777 F.2d at 247 (concluding that the plaintiff could add a claim of gender discrimination because the facts in her original charge supported such a claim, but holding that the plaintiff could not amend her complaint to include a claim of sexual harassment, because the facts alleged in the original charge did not support such a claim); see also *Sanchez, 431 F.2d at 462* ("The crucial element of a charge of discrimination is the factual statement contained therein."). In this

case, *Manning* failed to allege sufficient facts in his original charge to provide Chevron with the requisite notice. Therefore, we hold that *Manning's* amended charge, alleging disability discrimination, does not relate back to his original charge, which raised different theories of recovery.

As *Manning* acknowledges, our conclusion that *Manning's* ADA claim regarding the T-1 position was untimely "adversely affects" his additional disability discrimination claim. *Manning* was informed on July 19, 2000, that he would not be transferred to any position at the Cedar Bayou facility. He then had 300 days (or until May 15, 2001) to file a charge of discrimination. *Manning*, however, never filed any charge of discrimination with respect to these transfer positions. *Manning* believed that a new charge of discrimination was unnecessary, because (in his view) his ADA claims were already properly before the district court. However, as we have concluded, *Manning* did not file a timely charge of disability discrimination with respect to the T-1 position. Therefore, in order to bring a disability discrimination claim with respect to the transfer positions, he should have filed a new charge of discrimination. Because he failed to do so, his additional ADA claim is also time-barred.

Manning concedes that his disability discrimination claim regarding the Cedar Bayou facility was untimely. He argues, however, that we should apply the doctrine of equitable tolling to this claim.

As *Manning* asserts, the limitations period on filing a charge of employment discrimination "is subject to equitable doctrines such as tolling or estoppel." *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982). However, these equitable doctrines "are to be applied sparingly." *Morgan*, 536 U.S. at 113. The party who invokes equitable tolling bears the burden of demonstrating that it

applies in his case. *Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002).

We have identified three potential bases for equitable tolling: (1) the pendency of a suit between the same parties in the wrong forum; (2) the plaintiff's lack of awareness of the facts supporting his claim because of the defendant's intentional concealment of them; and (3) the EEOC's misleading the plaintiff about his rights. *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988). *Manning* asserts that all three bases for equitable tolling apply in his case.

Manning first argues that equitable tolling should apply because his case has been pending in the wrong forum. *Manning* appears to assert that, because he brought his claim in an untimely manner, the district court was the "wrong" forum for those claims. Evidently, *Manning* misunderstands the meaning of the first factor justifying equitable tolling. As we observed in *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979), equitable tolling is appropriate in the rare case when the parties have been litigating an action in state court, but they later discover that they chose the wrong forum under state law. *Id.* at 1302. This first basis for equitable tolling does not apply in *Manning's* case.

Manning next asserts that equitable tolling is appropriate because Chevron concealed the facts supporting his ADA claim. *Manning* suggests that he was unaware that his alleged disability (his stuttering) might have affected Chevron's decision with respect to the Cedar Bayou positions until the company released the notes from *Manning's* interview for the positions. These notes contained negative comments about *Manning's* speech and communication skills. *Manning* claims that, until these notes were released in November or December of 2000, he had no way of knowing that he might have been discriminated against based on his disability. Thus, *Manning* suggests, Chevron misled him about a potential ADA claim.

Manning's argument lacks merit. We equitably toll a limitations period only when the employer's affirmative acts mislead the employee and induce him not to act within the limitations period. *Ramirez*, 312 F.3d at 184; *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 391 (5th Cir. 2002). In this case, *Manning* has not alleged that Chevron took any action that might have induced him not to file a charge of discrimination. By his own admission, *Manning* failed to file a new charge with the EEOC solely because he believed his disability discrimination claims were already properly before the district court.

That leads us to *Manning's* assertion that the third basis for equitable tolling applies in his case: the EEOC misled him about the nature of his rights. *Manning* contends that, by issuing him a new right to sue letter (containing an ADA claim relating to the T-1 position), the EEOC led *Manning* to believe that he could properly bring his ADA claims. Once again, *Manning* misunderstands our stated basis for equitable tolling. We apply equitable tolling when an employee seeks information from the EEOC, and the organization gives the individual incorrect information that leads the individual to file an untimely charge. *See Ramirez*, 312 F.3d at 184. In this case, *Manning* does not allege that the EEOC gave him any incorrect information with respect to the proper time for filing his charge. Therefore, the third basis for equitable tolling does not apply in this case. *Manning's* disability discrimination claims are time-barred.[3]

---

[3] *Manning* suggests that his claims might be timely under a continuing violation theory. *Manning* fails, however, to adequately brief this issue, so we need not address it. *See Kane Enter. v. MacGregor (USA) Inc.*, 322 F.3d 371, 376 n.3 (5th Cir. 2003) (observing that issues inadequately briefed are deemed waived).

III

Manning alleges that Chevron discriminated against him on the basis of race and gender when it failed to promote him to a T-1 position. As we have observed, Chevron instead selected Peggy Williams (an African American female) and Fred Noyes (a Caucasian male). *Manning* contends that Chevron discriminated against him as an African American male.

Manning attempts to prove his race /gender discrimination claim by indirect (circumstantial) evidence. As a result, we apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this three-part scheme, a plaintiff must first present a prima facie case of discrimination. A plaintiff satisfies this initial burden by showing that (1) he belongs to a protected group; (2) he was qualified for the position sought; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class. *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). If the plaintiff can present a prima facie case, the burden shifts to the defendant to rebut the plaintiff's case by demonstrating a "legitimate, nondiscriminatory justification for its actions." *Id.* If the defendant offers such a justification, the burden shifts back to the plaintiff, who can attempt to show that the defendant's proffered reason is simply a pretext for discrimination. *Id.*

Both parties appear to agree that *Manning* has demonstrated a prima facie case of discrimination. Therefore, we proceed to the second two parts of the analysis.

Manning argues that Chevron has failed to articulate a legitimate, non-discriminatory reason for its decision not to promote him. As *Manning* observes, Chevron claimed that it selected the "best qualified" candidates for the T-1 position. *Manning* appears to argue that this declaration was not

sufficient. He claims that Chevron had to state the "specific reason [he] was denied [the] promotion." *Manning* appears to argue that Chevron was required to explicitly state that it chose Williams and Noyes because they were more qualified than *Manning*, rather than simply state that they were the "best qualified" candidates. We disagree. Chevron's statement that it chose the "best qualified" candidates clearly implies that it selected Williams and Noyes because they were better qualified than *Manning*. Chevron's explanation constitutes a legitimate, non-discriminatory justification for its failure to promote *Manning*. *See id.* at 721 n.2.

Because Chevron provided a legitimate, non-discriminatory justification, the burden shifted back to *Manning* to show that Chevron's asserted reason was a pretext for discrimination. In order to demonstrate that Chevron's asserted justification (that Williams and Noyes were more qualified) was pretext, *Manning* can attempt to show that he was "clearly better qualified" for the T-1 position. *Id. at 723*; *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280 (5th Cir. 1999).[4] *Manning* attempts to show that he was better qualified than Williams and Noyes by pointing to his educational background, his various technical and analytical skills, and his asserted good performance during the interview process. The facts presented by *Manning* fail, however, to suggest that

---

[4] *Manning* suggests that we should not apply our "clearly more qualified" standard, because, he asserts, it is inconsistent with the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). *Manning* fails to explain (and we fail to see) how the Court's decision in Reeves undermines our cases articulating the "clearly more qualified" standard. In any event, *Price v. Federal Express Corp.*, 283 F.3d 715 (5th Cir. 2002), a post-Reeves decision, makes clear that the standard still applies. See *id.* at 723.

he was clearly better qualified than the selected applicants.[5] Thus, *Manning* cannot demonstrate pretext in this manner.

Second, *Manning* contends that Chevron's assertion (that Williams and Noyes were the most qualified candidates) must be pretext because Chevron's hiring criteria were largely subjective. The mere fact that an employer uses subjective criteria is not, however, sufficient evidence of pretext. See *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002) (observing that "'absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII'") (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001)).

Third, *Manning* attempts to show pretext by pointing to Chevron's alleged failure to promote African American males to managerial or supervisory positions. The evidence he provides, however, does not demonstrate pretext. *See Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1071 (5th Cir. Unit A Jun. 1981) ("The statistical evidence buttresses [the plaintiff's] prima facie case, but it does not demonstrate that the reason advanced for failure to promote him lacked either substance or credibility.").

Finally, *Manning* relies on a discriminatory statement allegedly made by Wanda Weatherford ("Weatherford"), a Chevron employee who participated in the decisionmaking process for the T-1 positions. *Manning* asserts that Weatherford once used the word "nigger" in his presence. We have held that, in order for comments in the workplace to provide

---

[5] Indeed, it is not even apparent that *Manning* himself believes he was clearly better qualified than both Williams and Noyes. When questioned about Williams' qualifications, *Manning* stated that she was a "tremendous technician," suggesting that he believed Williams to be at least equally qualified for the T-1 position.

sufficient evidence of discrimination, they must be (1) related to the protected class of which the plaintiff is a member; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001). *Manning* cannot meet the second and fourth requirements of that test. *Manning* claims that Weatherford made the derogatory comment prior to 1994, at least four years before he applied for the T-1 position. *Manning* fails to allege either that the comment was made at (or around) the time of the promotion decision or that the comment related in any way to that employment decision. As a result, *Manning* fails to demonstrate pretext in this manner.

None of the other evidence presented by *Manning* creates a genuine issue of material fact regarding pretext. We thus conclude that the district court did not err in granting summary judgment to Chevron on this claim of race and gender discrimination.

IV

Manning contends that Chevron retaliated against him when it failed to transfer him to the Cedar Bayou and Kingwood facilities and when it refused to award him a $45,000 severance package. Title VII prohibits an employer from retaliating against an employee because that employee has complained about acts of discrimination at work. *See 42 U.S.C.* § 2000e-3(a) ("It shall be an unlawful employment practice . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

We have stated that, in order to establish a prima facie case of retaliation, the plaintiff must show (1) that he engaged in

an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there is a causal link between the protected activity and the adverse employment action. *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 191 (5th Cir. 2001).

Chevron argues that *Manning* cannot establish a prima facie case for the transfer positions because he cannot satisfy the third requirement: demonstrating a "causal link" between his protected activity and the adverse employment action. Chevron asserts that the supervisors who made the decisions regarding the lateral transfer positions were unaware that *Manning* had previously filed employment discrimination actions against the company. Chevron contends that, because these individuals were unaware of *Manning's* lawsuits, they could not have retaliated against *Manning* for filing the lawsuits.

We have determined that, in order to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001); *see also Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 168 (5th Cir. 1999) ("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct.").[6]

---

[6] *Manning* appears to contend that, in order to establish a prima facie case, he need not offer evidence that the Cedar Bayou or Kingwood decisionmakers were aware of any of his prior lawsuits. As *Manning* observes, "at this threshold stage, the standard for satisfying the causation element is 'much less stringent' than a 'but for' causation standard." *Fierros*, 274 F.3d at 191. Although the plaintiff's burden at the prima facie stage is not onerous, the plaintiff must produce at least some evidence that the decisionmakers had knowledge of his protected activity. *See Medina*, 238 F.3d at 684. If the decisionmakers were completely

To show that the decisionmakers at the Cedar Bayou and Kingwood facilities were aware of his lawsuits, *Manning* offers only an ambiguous statement by John Swansiger ("Swansiger"), who apparently was a supervisor at the Chevron facility where *Manning* worked. Swansiger was the individual who informed *Manning* that he was not selected for any of the lateral transfer positions. During this conversation, after Swansiger told *Manning* that he had not received a Cedar Bayou position, *Manning* asked about the Kingwood facility. According to *Manning*, Swansiger replied, "No, they don't want that." According to *Manning*, although he asked Swansiger about the statement, Swansiger never explained the meaning of the comment, *Manning* ultimately concluded that Swansiger was referring to *Manning's* employment discrimination actions.

We conclude, however, that Swansiger's statement does not indicate that any of the decisionmakers at the Cedar Bayou or Kingwood facilities knew about *Manning's* previous lawsuits against Chevron. As a result, *Manning* fails to demonstrate a causal link between his protected activity and Chevron's failure to transfer him. Thus, *Manning* cannot establish a prima facie case of retaliation for the lateral transfer positions.

Finally, *Manning* claims that Chevron retaliated against him by failing to award him a $45,000 severance package. This package was offered to the Chevron employees who lost their jobs during the company reorganization of 2000. In order to receive the package, *Manning* had to sign a release form, waiving all claims against the company. *Manning* was unwilling to do so, because Chevron informed him that signing the release would require him to abandon the lawsuit

---

unaware of the plaintiff's protected activity, then it could not be said (even as an initial matter) that the decisionmakers might have been retaliating against the plaintiff for having engaged in that activity.

he had already filed. *Manning* contends that Chevron's failure to award him the severance package constituted retaliation.

Again, *Manning* must show that there was a causal connection between Chevron's refusal to award him the severance package and his protected activity. *Manning*, however, fails to demonstrate that causal link. The record shows that Chevron required all employees to sign the same release form before they could receive the severance package. Thus, when Chevron refused to award *Manning* a severance package, it was simply applying that general policy to *Manning*, not retaliating against him for bringing an action against the company. *See Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1508 (3rd Cir. 1996) *(concluding that the plaintiff failed to prove the causal link required for a retaliation claim, because the defendant employer "required completion of a form waiving all claims against [the employer] from all employees prior to disbursing the [benefits]") (emphasis added).*

Manning has not demonstrated that the district court erred in granting Chevron's motion for summary judgment. As a result, the judgment of the district court is AFFIRMED.

DENNIS, *Circuit Judge*, specially concurring:

While I agree with much of the majority opinion, I write separately to express disagreement with the majority's statement in a footnote that *Price v. Federal Express Corp.*, 283 F.3d 715 (5th Cir. 2002), established that *Deines v. Texas Department of Protective & Regulatory Services*, 164 F.3d 277 (5th Cir. 1999), survived the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). I believe that this remains an open question that we must resolve in a future, appropriate case.

In Reeves the Supreme Court rejected prior Fifth Circuit jurisprudence holding that a plaintiff needed evidence beyond evidence showing that an employer's proffered non-discriminatory reason for an employment decision is false in order to establish a Title VII claim. Rather, a plaintiff's prima facie case combined with evidence that the employer's stated reasons are false can be sufficient grounds to support a verdict for a plaintiff. *Reeves*, 530 U.S. at 148.

Whether the "clearly better qualified" standard articulated in Deines is consistent with Reeves is unclear. While Deines could be read, in accordance with Reeves, to merely state the standard of proof required to establish that the employer's stated reasons are false, the opinion specifically denied that the test it applied did so. *See Deines*, 164 F.3d at 281. The opinion's stated purpose of describing the "quality" of evidence needed to establish the "ultimate fact" of intentional discrimination, *id.*, sounds suspiciously similar to the requirement of additional evidence of intentional discrimination beyond proof of falsity that the Supreme Court found inconsistent with Title VII in Reeves. And contrary to the majority's suggestion, our continued application of Deines in Price without analysis of whether Deines survived Reeves does not establish that Deines is still good law. Rather, it

merely shows that litigants in Price failed to properly raise the issue of Deines' vitality.

Thus, I believe that this court must one day confront whether Deines is still good law. This, however, is not that day, as *Manning* has introduced no relevant evidence suggesting that his employer's proffered explanation is false. Most of *Manning's* rebuttal evidence consists of conclusory assertions insufficient to withstand summary judgment. *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002). The remaining evidence consists of *Manning's* different educational background and additional years of experience in his current position, both of which Chevron has established were not criterion for the T-1 position. In fact, as the majority accurately explains, *Manning* has all but admitted that at least one of the people who received the job instead of him was as well qualified for the position as he was. Hence, I believe that we should affirm the district court's grant of summary judgment here without reaching the thorny question of whether the Deines' "clearly better qualified" standard remains good law.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

[Filed Sep. 7, 2001]

1:00-CV-143 (TH)
JURY

RONALD H. MANNING,
Plaintiff,

VS.

CHEVRON CHEMICAL COMPANY LLC,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR COMPLETE SUMMARY JUDGMENT

Before the Court is *Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 77), *Plaintiff's Response to Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 93), *Defendant Chevron Chemical Company LLC's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment* (Doc. No. 96), and *Plaintiff's Supplemental Response to Defendant's Motion for Complete Summary Judgment* (Doc. No. 100). The Court heard arguments on Defendant's Motion for Summary Judgment on June 14, 2001. At the close of the hearing, the Court ruled on certain issues raised by Defendant. Having considered the arguments of counsel, the papers submitted, the applicable law and the record in this case, the Court now

GRANTS Defendant's Opposed Motion for Complete Summary Judgment (Doc. No. 77) in its entirety.

I. BACKGROUND

Plaintiff Ronald Manning filed this lawsuit against Defendant Chevron Chemical Company, alleging three separate instances of employment discrimination and retaliation under Title VII and the American with Disabilities Act ("ADA"). Plaintiff, an African American male, was employed by Defendant from 1977 until his termination in 2000. The allegations by Plaintiff involve three different groups of decision-makers, at three different sites owned and operated by Defendant, at three different times. First, Plaintiff disputes the 1998 selection of an African American female and a Caucasian male for promotion, aguing that he was denied the promotion due to his (1) race/gender, (2) alleged disability (stuttering), and (3) two previous employment discrimination lawsuits he brought against Defendant. In the second and third action, Plaintiff contends that Defendant unlawfully retaliated against him by failing to award him positions at two other facilities during Defendant's year 2000 reduction-in-force and reorganization. In addition, Plaintiff filed claims against Defendant alleging disparate impact and hostile work environment.

Defendant moved for complete summary judgment, and Plaintiff responded. The Court heard arguments on Defendant's Motion for Summary Judgment on June 14, 2001. At the close of the hearing, the Court ruled on certain issues raised by Defendant. Specifically, the Court granted partial summary judgment: (1) as to all issues related to Plaintiff's disability discrimination claim; (2) as to all issues related to Plaintiff's hostile work environment claim; (3) as to all issues related to Plaintiff's disparate impact claim; and (4) as to all issues related to Plaintiff's retaliation claim. The Court now considers the remaining issues raised in Defendant's motion.

II. LEGAL STANDARD—MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is no genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *Id.* at 248, 106 S.Ct. at 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *Id.* at 247-48, 106 S.Ct. 2510. If the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should be granted. *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2553. The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita*, 475 U.S. at 585-87, 106 S.Ct. at 1355-56. The Court must accept the evidence of the nonmoving party and draw all justifiable inferences in favor of that party. *Id.* However, to meet its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," but instead, must "come

forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting FED.R.CIV.P. 56(e)).

III. DISCUSSION

To survive a motion for summary judgment in a race/gender promotion discrimination case, Plaintiff must make an initial *prima facie* showing of such discrimination. That is, Plaintiff must show (1) that he belongs to a racial minority, (2) that he was qualified for the position for which Defendant was seeking applicants, (3) that, despite his qualifications, he was rejected, and (4) that the position was filled with candidates who were not African American males. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If Plaintiff satisfies his burden and makes a *prima facie* case of discrimination, the burden then shifts to Defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If Defendant successfully discharges its burden, then Plaintiff must be afforded a fair opportunity to show that Defendant's reason for rejection was in fact a pretext for discrimination. *See id.* at 804.

Plaintiff asserts that Defendant did not promote him to the position of Molding Group T-1 or Pipe/PDG Group T-1 because he is an African-American male, suffers from an alleged disability, and filed prior complaints against Defendant. Further, Plaintiff contends that Defendant denied him lateral transfer positions at its Cedar Bayou and Kingwood facilities in retaliation for prior claims. To support his contention, Plaintiff relies on his (1) job tenure with Defendant, (2) subjective belief he is better qualified because he has a college degree, and (3) subjective belief that Defendant's Technology Center in Orange, Texas discriminates against African-American males.

In *Bodenheimer v. PPG Industries*, the Fifth Circuit held that tenure does not equate to superior qualifications. *See* 5

F.3d 955, 959 (5th Cir. 1993). Further, the law is clear that subjective belief does not constitute competent evidence of discrimination. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997). In its motion and at the hearing, Defendant submitted evidence that it did not select Plaintiff for the disputed promotional opportunities because it determined that Peggy Williams (African-American female) and Fred Noyes (Caucasian male) were the best qualified candidates for the position. For Plaintiff to take a promotion claim to the jury, he must present "evidence that he was clearly better qualified than [other] employees who were selected for the position at issue. . . ." *Deines v. Texas Dep't of Protective & Regulatory Serv.*, 164 F.3d 277, 280 (5th Cir. 1999). Furthermore, Plaintiff must show a "significant disparity" in qualification sufficient to "jump off the page and slap us in the face." *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998). Plaintiff has not made such a showing. The Court does not dispute that Plaintiff can make a *prima facie* case for race/gender discrimination. However, the Court FINDS that Plaintiff has not satisfied his burden of presenting evidence to overcome Defendant's legitimate, nondiscriminatory reasons for its selections.

To proceed with a disability discrimination claim, Plaintiff must first establish that he timely filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"). *See Rogers v. International Marine Terminals*, 87 F.3d 755, 758 (5th Cir. 1996.) That is, Plaintiff must file a charge of discrimination within 300 days of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); 42 U.S.C. § 12117(a). Failure to timely file a charge of discrimination renders the charge untimely and the claimant is precluded from bringing an action with respect to the untimely charge. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995).

To timely file a charge of disability discrimination relating to the June 16, 1998 promotions, the deadline for Plaintiff's charge of discrimination was April 12, 1999. 42 U.S.C. § 12117(a). It is undisputed that Plaintiff did not file a charge of disability discrimination until November 20, 1999. That Plaintiff filed a race and gender discrimination charge on October 20, 1998, and "amended" the same on November 20, 1999, does not salvage his disability discrimination claim because amendments that add entirely new and distinct claims do not relate back to the original filing date. *See e.g., Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247-48 (5th Cir. 1985). Thus, the Court FINDS that Plaintiff's disability discrimination claim is time-barred, and Defendant is entitled to summary judgment as a matter of law.

For Plaintiff to demonstrate a *prima facie* claim for retaliation, he must prove (1) that he engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal connection exists between the participation in the activity and the adverse employment action. *See Webb v. Cardiothoracic Surgery Assocs. P.A.*, 139 F.3d 532, 540 (5th Cir. 1998). After considering the evidence submitted at oral argument and in the parties' filings, the Court FINDS that Plaintiff has not produced sufficient evidence to make a *prima facie* claim for retaliation. In fact, the only evidence Plaintiff submitted on his retaliation claim was a vague comment by one of his superiors. Accordingly, Plaintiff has no evidence of a causal connection between his protected activity and any alleged adverse employment action.

To establish a *prima facie* case of disparate impact discrimination, Plaintiff must identify specific practices responsible for any observed disparities and must conduct a systematic analysis of those employment practices. *See Fuller v. General Cable Indus.*, 81 F.Supp.2d 726, 728 (E.D. Tex.2000). In doing so, Plaintiff must provide sufficient evidence to raise an inference of causation. *See id.* If

Plaintiff succeeds in making such a showing, Defendant, to be free of liability, must then demonstrate that the challenged practice is justified by business necessity. *See Page v. U.S. Indus., Inc.*, 726 F.2d 1038, 1053 (5th Cir. 1984). If Defendant rebuts the *prima facie* case by showing the challenged practices to be job-related, Plaintiff may still prevail by showing a less discriminatory alternative. *See id.*

In the present case, Plaintiff cannot establish a *prima facie* case, because he fails to go beyond the bald assertion that he is not aware of any African-American males filling supervisory or managerial positions in Defendant's Orange Technology Lab. Plaintiff's disparate impact claim shows no causal connection between the alleged imbalance of African-American males in supervision or management and the alleged practices or policies at issue in this lawsuit. *See, e.g., Scales v. Slater*, 181 F.3d 703, 708 (5th Cir. 1999). Plaintiff's sole contention that there is under representation of African-American males in management or supervision, without more, is insufficient to establish a *prima facie* disparate impact claim. As such, the Court FINDS there is no genuine issues of material fact with respect to Plaintiff's disparate impact claim.

The Court need not address Plaintiff's hostile work environment claim because Plaintiff conceded at the hearing that he had not satisfied the administrative prerequisites.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiff has not come forward with genuine issues of material fact sufficient to survive summary judgment. Consequently, Defendant is entitled to judgment as a matter of law on all Plaintiff's claims. Because Plaintiff cannot survive summary judgment on his substantive claims, the Court need not address Plaintiff's request for punitive damages.

IT IS THEREFORE ORDERED that *Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 77) is, in all things, GRANTED.

IT IS FURTHER ORDERED that Plaintiff's cause of action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that all motions not previously ruled on are DENIED AS MOOT, and each side shall bear their own costs and expenses.

Finally, the Clerk of the Court may CLOSE the above-styled and numbered cause of action.

SO ORDERED.

Signed this the 6th day of September, 2001.

/s/ Thad Heartfield
THAD HEARTFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTES AND REGULATIONS

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES EMPLOYMENT

42 USCS § 12117 (2003)

§ 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106 [42 USCS § 12116], concerning employment.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-5 (2001)

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such

form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal

proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§ 2000e *et seq.*] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

FEDERAL REGULATIONS

TITLE 29 LABOR
SUBTITLE B—REGULATIONS RELATING TO LABOR
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1601—PROCEDURAL REGULATIONS
SUBPART B—PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

29 CFR 1601.12

§ 1601.12 Contents of charge; amendment of charge.

(a) Each charge should contain the following: (1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: *See* § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement

sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

TITLE 29—LABOR

SUBTITLE B—REGULATIONS RELATING TO LABOR
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1601—PROCEDURAL REGULATIONS
SUBPART B—PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES PROCEDURE FOLLOWING FILING OF A CHARGE

29 CFR 1601.21

§ 1601.21 Reasonable cause determination: Procedure and authority.

* * * *

(b) The Commission shall provide prompt notification of its determination under paragraph (a) of this section to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the case of a Commissioner charge, the person named in the charge or identified by the Commission in the third party certificate, if any, and the respondent. The Commission may, however, on its own initiative reconsider its decision or the determination of any of its designated officers who have authority to issue Letters of Determination, Except that the Commission will not reconsider determinations of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25.

(1) In cases where the Commission decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not receive a notice of right to sue

pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. If the 90 day period has expired, the charging party has filed suit, or the charging party had requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination, but will not revoke the notice of right to sue. After reconsideration the Commission will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the Commision will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit.

* * * *

APPENDIX E

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Mr. Ronald Manning 4390 Ector Ave. Beaumont, Tx 77705	Equal Employment Opportunity Commission Houston District Office 1919 Smith, 7th Floor Houston, Texas 77002

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR §§ 1601.7(a))*

Certified Mail No. P 559 717 989

Charge No.	EEOC Representative	Telephone No.
330990188	Charles McConnell, Supervisor	(713) 209-3380

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON.

[ ] The facts you allege fail to state a claim under any of the statutes enforced by the Commission.

[ ] Respondent employs less than the required number of employees.

[ ] Your charge was not timely filed with the Commission, *i.e.*, you waited too long after the date(s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations.

[ ] You failed to provide requested information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

[ ] The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

[ ] The respondent has made a reasonable settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

- NOTICE OF SUIT RIGHTS -

[X] Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost. WITH THE ISSUANCE OF THIS NOTICE OF RIGHT TO SUE, THE COMMISSION IS TERMINATING ITS PROCESS WITH RESPECT TO THIS CHARGE.

[ ] Age Discrimination in Employee Act: This is your NOTICE OF DISMISSAL OR TERMINATION. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost. WITH THE ISSUANCE OF THIS NOTICE OF RIGHT TO SUE, THE COMMISSION IS TERMINATING ITS PROCESS WITH RESPECT TO THIS CHARGE.

[ ] Equal Pay Act (EPA): EPA suits must be brought within 2 years (3 years for willful violations) of the alleged EPA underpayment.

On behalf of the Commission

/s/ Charles M. McConnell
for H. JOAN EHRLICH
DISTRICT DIRECTOR

11/26/99
(Date)

cc: Mr. James R. Chandler
Human Resources Manager
Chevron Chemical Company
P.O. Box 7400
Orange, TX 77631-7400
RESPONDENT CONTACT PERSON

Enclosures
Information Sheet
Copy of Charge

EEOC Form 161 (Test) 5/95)
CHEVRON 0398

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974: See Privacy Act Statement before completing this form.

Agency ___FEPA _X_EEOC

Charge Number
Amended:
330990188

Texas Commission on Human Rights and EEOC
State or local Agency, if any

Name: Mr. Ronald H. Manning

Home Telephone: (409) 835-5906

Street Address: 4390 Ector Ave., Beaumont, TX 77705

Date of Birth: 01/16/50

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME.

Name: CHEVRON CHEMICAL COMPANY

Number of Employees, Members: Cat D (501+)

Telephone: (409) 886-7491

Street Address: P.O. Box 7400, Orange, TX 77631-7400

County: 245

CAUSE OF DISCRIMINATION BASED ON

_X_ Race _X_ Sex _X_ Retaliation _X_ Disability

Date Discrimination Took Place: 06/16/98

The Particulars Are:

I. On June 16, 1998, I was denied a promotion to the position of molding group t-1 and to the position of pipe/PDG group t-1.

II. I was informed of the selections verbally and via memo from my immediate supervisor.

III. I believe that i have been denied a promotion because of my race, black, my gender, male and in retaliation for filing previous charges of discrimination against Chevron, in violation of Title VII of the Civil Rights Act of 1964, as amended. No black males have ever been promoted to the T-1 position since 1989, when the position was implemented.

IV. I wish to amend the charge to include being denied promotion because of disability, as defined by, and covered under, the Americans with Disabilities Act.

/s/ Ronald H. Manning	11/20/99	CHEVRON 0424
Signature	Date	

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the proceeding of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

I swear of affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

/s/ Ronald H. Manning

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

26 Oct. 1998

[LOGO] Chevron

Chevron Chemical Company LLC
P.O. Box 7400
Orange, TX 77631-7400
Phone 409 886 7491

November 15, 1999

Mr. Cleveland Hopwood
Investigator
U.S. Equal Employment Opportunity Commission
Houston District Office
1919 Smith St., 7th Floor
Houston, TX 77002-8049

Orange Plant

Re: Charge Number 3309901888
Charging Party Ronald H. Manning

Dear Mr. Hopwood:

This letter will acknowledge my phone conversation with you on Friday, November 12, 1999 in which I responded to the questions included in your October 28, 1999 letter to James R. Chandler.

Following are your questions and the responses that were provided:

> Please provide me with each individual score given by each of the Selection Team members for each job selection criteria. I need to know how each member individually ranked the Charging Party, and the other candidates. If each evaluator completed a separate Candidate Evaluation Form, submit copies."

Response:

> Please refer to our December 14, 1998 position statement on Mr. Manning's above-referenced charge. Exhibit I of our position statement provides the Chevron Chemical Company Job Selection Process. The last

page of Exhibit I under XIV—Select Final Candidate states that the team will assess the relative skills, knowledge and experience of each candidate against the selection criteria communicated in the Job Announcement. *The team will reach a consensus decision.* This was done in filling the Molding T1 job and the Pipe/PDG job. The candidate results are shown in Exhibit II of the position statement. Each evaluator (team member) did not complete a separate Candidate Evaluator Form.

Also, in our position statement, you will find comments from the selection team as to why Mr. Manning received the ratings that he did on each of the Job Selection Criteria.

If you have any further questions, please contact me at (409) 882-6274.

Sincerely,

/s/ Randall R. Martin
RANDALL R. MARTIN
Human Resources Business Partner

CHEVRON 0403

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[SEAL] Houston District Office

1919 Smith St. 7th Floor
Houston, TX 77002-8049
PH: (713) 209-3320
TDD: (713) 209-3439
FAX: (713) 209-3381
LEGAL: (713) 209-3401

CLEVELAND HOPWOOD
DIR. LINE: (713) 209-3319

October 28, 1999

Mr. James R. Chandler
Human Resources Manager
Chevron Chemical Company
P.O. Box 7400
Orange, Texas 77631-7400

Re: Charge Number: 330 99 0188
Charging Party: Ronald H. Manning

Dear Mr. Chandler:

Pursuant with the continuation of the investigation of the above cited charge, I request that you provide the following information on or before November 16, 1999:

You provided the overall evaluation scores for the candidates which reflects the Charging Party attained the lowest scores. I will need more specific information. Please provide me with the each individual score given by each of the Selection Team members for each job selection criteria. I need to know how each member individually ranked the Charging Party, and the other candidates. If each evaluator completed a separate Candidate Evaluation Form, submit copies.

If you have any questions, please contact me, Cleveland Hopwood, Investigator, at (713) 209-3319.

Sincerely,

/s/ Cleveland Hopwood
CLEVELAND HOPWOOD

CHEVRON 0404

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Houston District Office

1919 Smith, 7th Floor
Houston, TX 77002-8049
PH: (713) 209-3320
TDD: (713) 209-3439
FAX: (713) 209-3381
LEGAL: (713) 209-3401

CERTIFIED RECEIPT NO: Z 259 282 131

Mr. Ronald H. Manning
4390 Ector Avenue
Beaumont, Texas 77705

Charging Party

Mr. R.A. Walker
Chevron Chemical Company
P.O, Box 7400
Orange, Texas 77631-7400

Respondent

Charge No.: 330 99 0188

RECONSIDERATION OF DISMISSAL
AND NOTICE OF RIGHTS

Pursuant to the authority vested in me under Section 1601.21(b)(1) of the Equal Employment Opportunity Commission's Procedural Regulations, I hereby vacate and revoke the Dismissal and Notice of Rights dated July 6, 1999, which was issued on the above referenced charge. In those circumstances where the Dismissal and Notice of Rights has been revoked, the Commission will, in accordance with 1601.28, issue a Dismissal and Notice of Rights anew which will provide the Charging Party with 90 days within to bring suit.

This letter will serve as notice that the Investigation of the above numbered charge will continue. If you have any

questions regarding this matter, please contact Mr. Javier Chacon, Deputy Director, at the address given above or by telephone at (713) 209 -3376.

On behalf of the Commission:

10/6/99
Date

/s/ Javier Chacon
for H. Joan Ehrlich
District Director

CC: Victoria L. Plante - Charging Party Attorney
Attorney At Law
3730 Kirby, Suite 901
Houston, Texas 77002

VICTORIA L. PLANTE
ATTORNEY AT LAW

RIVER OAKS TOWER
3730 KIRBY, SUITE 901
HOUSTON, TEXAS 77098

TEL: (713) 526-2615
FAX: (713) 520-6853
E-Mail: plante@neosoft.com

September 30, 1999

H. Joan Ehrlich, District Director
EEOC - Houston District Office
1919 Smith, 7th Floor
Houston, Texas 77002

RE: Ronald Manning; Charge No. 330990188

Dear Ms. Ehrlich:

I have been retained by Ronald Manning to represent him in a discrimination claim against Chevron Chemical Company. Mr. Manning received his right to sue letter from the EEOC on or about July 8, 1999.

Per my telephone conversation with Rose Mendez on September 29, 1999, wherein she advised me to write you a letter requesting that the charge of discrimination and the right to sue letter in the above referenced matter be amended, I request that the charge and right to sue letter be amended to include a cause of action pursuant to the Americans with Disabilities Act.

Mr. Manning initially consulted with me and retained my services on September 27, 1999. During the consultation, I became aware that Mr. Manning has a severe stuttering problem. I advised him of his right not to be discriminated against because of a speech impediment. He was totally unaware of his rights under the ADA because he did not know that stuttering may be a disability. Therefore, he did not include this violation in his charge. Chevron submitted information to the EEOC that Mr. Manning was a "stutterer." Chevron also recognized stuttering as an ADA disability.

In Mr. Manning's twenty-two (22) years of employment with Chevron, he has never received a promotion. Mr. Manning has been interviewed for numerous positions, but believes that the stigma and stereotype associated with severe stuttering has affected hiring personnel decisions to promote him. Because he cannot speak as other applicants, stereotypical views of stuttering, such as ignorance and lack of authoritativeness, have affected and will continue to affect promotion decisions.

The information submitted by Chevron during the EEOC investigative period, gives information reasonably related to potential violations of the ADA. Specifically, Chevron responds to Mr. Manning's charge that he was unlawfully denied promotion by stating, "Ron's answers to some of the interview questions tended to ramble and he repeated himself several times on answers to questions." Based on his score in the interview process, Mr. Manning was not offered one of the two positions.

Mr. Manning is a competent and intelligent employee. He has a BBA in Marketing and is qualified to carry out the essential functions of the position. However, because he is not able to speak without repeating himself or stuttering, he has been discriminated against on the basis of this disability as well as his race and gender.

I am in the process of drafting Mr. Manning's original complaint regarding violations of Title VII, discrimination based on race and gender, as well as his retaliation claim. I would like to include his ADA claim as well. However, I need a right to sue letter that gives Mr. Manning permission to sue under the ADA.

I am aware that Mr. Manning may amend his charges. Please advise me of the steps I need to take in order to have Mr. Manning's right to sue and charge of discrimination amended to include an ADA claim.

Thank you for your prompt attention to this matter. I look forward to hearing from you.

Sincerely,

/s/ Victoria L. Plante
Victoria L. Plante

cc: Ronald Manning

Supreme Court, U.S.
FILED
NOV 2 8 2003
OFFICE OF THE CLERK

No. 03-630

In The Supreme Court of the United States

RONALD H. MANNING,

Petitioner,

v.

CHEVRON CHEMICAL COMPANY, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HOLLY H. WILLIAMSON
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
711 Louisiana, Suite 1900
Houston, Texas 77002
(713) 220-5800 (telephone)

Attorneys for Respondent Chevron Chemical Company, LLC

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether an untimely-filed charge of disability discrimination relates back to a timely-filed charge of race and sex discrimination.

2. Whether the equitable tolling doctrine applies to a party represented by counsel who unreasonably claims that he believed he satisfied all administrative prerequisites.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

1. Ronald Manning
   Petitioner

2. Victoria L. Plante
   5177 Richmond Avenue, Suite 1275
   Houston, Texas 77056
   Petitioner's trial and appellate counsel

3. Chevron Chemical Company, LLC
   Respondent

4. Chevron Phillips Chemical Company LP
   Respondent's successor corporation

5. Holly H. Williamson
   Tara B. Hittelman
   Akin Gump Strauss Hauer & Feld LLP
   711 Louisiana, Suite 1900
   Houston, Texas 77002
   Respondent's trial and appellate counsel

6. Pursuant to Rule 29.6, Respondent advises that Chevron Phillips Chemical Company LP, the successor in interest to Chevron Chemical Company LLC, is wholly owned by Chevron Phillips Chemical Company LLC. Chevron Phillips Chemical Company LLC is wholly owned by ChevronTexaco and ConocoPhillips, either directly or indirectly through their wholly-owned subsidiaries. ChevronTexaco's ownership interest is held entirely by Chevron U.S.A. Inc., its wholly-owned subsidiary. ConocoPhillips' ownership interest is held by ConocoPhillips Company, WestTTex 66 Pipeline Company, Phillips Chemical Holdings Company and Phillips Petroleum International Corporation, all wholly-owned subsidiaries of Conoco Phillips.

TABLE OF CONTENTS

	Page
RESTATEMENT OF THE QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6	ii
RESTATEMENT OF THE CASE	1
ARGUMENT AND AUTHORITIES	8
RESPONDENT'S REASONS FOR DENYING THE WRIT	8
I. Petitioner Did Not Articulate a Compelling Reason to Justify Discretionary Review by This Court	8
II. The Fifth Circuit Court of Appeals' Decision is Consistent With The Application of the Relation-Back Doctrine and Does Not Violate Statutory or Regulatory Authority	9
III. The Equitable Tolling Doctrine is Consistently Applied, and is Not Applicable in This Case	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Allen v. Denver Pub. Sch. Bd., 928 F.2d 978 (10th Cir. 1991) 14

Amburgey v. Corhart Refractories Corp., 936 F.2d 805 (5th Cir. 1991) 15

Blumberg v. HCA Management Co., 848 F.2d 642 (5th Cir. 1988) 16

Brunt v. Service Employees Int'l Union, 284 F.3d 715 (7th Cir. 2002) 6

Burnett v. New York C. R. Co., 380 U.S. 424, 85 S. Ct. 1050 (1965) 15

Cheek v. Western & S. Life Ins. Co., 31 F.3d 497 (7th Cir. 1994) 14

Cruce v. Brazosport Indep. Sch. Dist., 703 F.2d 862 (5th Cir. 1983) 17

Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995) 13

EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) 10

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996) 10

Fairchild v. Forma Sci., 147 F.3d 567 (7th Cir. 1998) 11, 12

Foman v. Davis, 371 U.S. 178 (1962) 6

Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959) 15

Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 112 L.Ed.2d 435, 111 S. Ct. 453 (1990) 15, 17

Koelsch v. Beltone Elecs. Corp., 46 F.3d 705 (7th Cir. 1995) 9

Leong v. Potter, No. 02-16856, 2003 WL 22439875 *2 (9th Cir. Oct. 29, 2003) 11, 13

Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) 14

Manning v. Chevron Chem. Co., LLC, 332 F.3d 874 (5th Cir. 2003) 10

McKenzie v. Illinois Dept. of Trans., 92 F.3d 473 (7th Cir. 1996) 14

McKenzie v. Lunds, Inc., 63 F. Supp. 2d 986 (D. Minn. 1999) 9

National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002) 14, 15

Pacheco v. Rice, 966 F.2d 904 (5th Cir. 1992) 15

Phelps v. McClellan, 30 F.3d 658 (6th Cir. 1994) 6

Ramirez v. City of San Antonio, 312 F.3d 178 (5th Cir. 2002) 15

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 10

Simms v. Oklahoma Ex Rel. Dept. of Mental Health & Substance Abuse Servs., 165 F.3d 1321 (10th Cir. 1999) 9, 10, 11, 12, 13

Simms v. State of Oklahoma, 528 U.S. 815 (1999) 8

Southmark Corp. v. Schulte Roth & Zabel, 88 F.3d 311 (5th Cir. Tex. 1996) (*In re Southmark Corp.*) 6

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Texas Dep't of Crim. Justice, 220 F.3d 389 (5th Cir. 2000) 11

Washington v. Kroger Co., 671 F.2d 1072 (8th Cir. 1982) 11

Weigel v. Baptist Hosp. of East Tennessee, 302 F.3d 367 (6th Cir. 2002) 17

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 7

STATUTES AND REGULATIONS

29 C.F.R. § 1601.12(b) 9, 10

42 U.S.C. § 2000e-5(e) 9

42 U.S.C. § 12117(a) 9

RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

Petitioner's Statement of the Case provides an inaccurate recitation of facts and law. Thus, pursuant to Supreme Court Rules 15(2) and 24(1)-(2), Respondent provides this Court with clarifications to Petitioner's Statement of the Case.

As a prefatory matter, the entire basis for Petitioner's request for a writ is his failure to timely file Americans With Disabilities Act ("ADA") charges of discrimination in years 1998 and 2000. Petitioner, however, was no novice at perfecting charges. In this regard, Petitioner filed charges of discrimination in 1990 and 1993. Appendix A. The 1990 charge resulted in a May 1991 lawsuit against Respondent in which Petitioner claimed race discrimination in connection with the denial to him of a promotion. The 1993 charge resulted in a February 1995 lawsuit against Respondent, in which Petitioner claimed that he was denied a promotion due to his alleged disability, "speech," and race, Black.[1] Appendix B. This litigation history of Petitioner certainly emphasizes a degree of expertise when it comes to filing charges and lawsuits of discrimination, including disability discrimination.

In 1998, Petitioner unsuccessfully sought one of two positions at Respondent's Technology Lab in Orange,

---

[1] This 1995 lawsuit was dismissed. There is no factual evidence that would establish that the decisionmakers in this lawsuit were aware of any prior lawsuits, and Respondent affirmatively presented evidence that they were not aware of such lawsuits or the basis of such lawsuits. *See, e.g.*, Petitioner's Appendix B-C.

Texas. Specifically, Respondent posted two openings for a Technician 1 (T-1) position in the Molding and the Pipe/PDG Groups. Petitioner (African-American male), an African-American female, and two Caucasian males nominated themselves for the positions by submitting an evaluation form in which they disclosed their specific qualifications for the positions. The evaluation form includes a box entitled "Special Considerations." The purpose of the "Special Considerations" box is unrelated to selections unless those selections are associated with the Company's attempt to "redeploy" an employee selected for layoff, a situation that did not apply to the T-1 positions. Because there existed no layoff at the time of these T-1 decisions, and because the decisionmakers had worked many years with the four self-nominated T-1 candidates, the decisionmakers did not examine the "Special Considerations" box. As such, they did not see or take note of *Petitioner's* typewritten statement in the *Candidate's* Comments section of the box: "Re: Special Considerations (ADA) AMERICAN DISABILITY ACT – STUTTER [sic]."[2] In filling the two T-1 positions, the Respondent utilized its non-discriminatory and non-retaliatory Job Selection

[2] Any implication by Petitioner to this Court that Respondent wrote such a statement on the form is, therefore, misleading and incorrect. Moreover, it is misleading for Petitioner to state that Respondent knew of Petitioner's "stuttering problem" based on a 1977 entry on an initial interview form maintained in his personnel file that stated, "hint of a stuttering problem which he has very well mastered." It is undisputed that the decisionmakers at issue in this case did not review the personnel file, and did not know (despite many years of working with Petitioner) that Petitioner allegedly stuttered or had any speech issues.

Process. Based on the selection criteria and the information provided by each of the four candidates during the interviews, the Selection Team determined that Peggy Williams, an African-American female, and Fred Noyes, a Caucasian male, were best qualified for the T-1 positions.[3] Petitioner learned that he did not obtain a T-1 position on June 16, 1998.

Petitioner filed a charge of race and gender discrimination and retaliation on October 26, 1998, claiming Respondent denied him a T-1 position because of his race (black), gender (male), and in retaliation for filing previous charges of discrimination against Respondent. *See* Petitioner's Appendix E. Petitioner also expressly stated in the charge, "*No black males have ever been promoted to the T-1 position since 1989, when the position was implemented.*" *Id.* (emphasis added). In the EEOC Charge Information Form, and in response to the question "[d]o you believe that you have been discriminated against because of your race, color, national origin, religion, sex, age or disability," Respondent replied, "*Yes*," and further explained: "*Race Sex. I have filed charges with the EEOC twice before. After the first filing, the company settled; After the second filing, I lost. No black males in my dept (area) have been promoted.*" Appendix A (emphasis added).

---

[3] Contrary to Petitioner's statement in the Petition at Note 2 that Respondent merely stated that Noyes and Williams were the best-qualified candidates, Respondent, pursuant to the Local Rules of the Eastern District of Texas, attached a Statement of Material Facts with supporting evidence that proved the reasons it believed Noyes and Williams were best-qualified for the jobs.

In its December 14, 1998, statement to the EEOC, Respondent identified the basis for its calculation of Petitioner's score during the selection process – noting that his technical experience in molding and statistics was good, but he lacked skills in the areas of leadership, setting priorities, team work and control charting; while his planning and scheduling skills were adequate, his skills ranked lower than the other candidates; in addition, the Respondent provided the EEOC with documentation of its Job Selection Process, the candidate evaluation matrix completed by the Job Selection Team, the Candidate Evaluation Forms and resumes completed and submitted by all of the candidates, the Personnel Announcement of the decisions, and Respondent's policy on Equal Employment Opportunity. *See* Petitioner's Appendix E. In response, the EEOC issued a Dismissal and Notice of Rights on July 6, 1999. *Id.*

On September 29, 1999, and September 30, 1999, Petitioner's lawyer requested an amendment to the race/sex/retaliation charge of discrimination, seeking to add a charge under the Americans with Disabilities Act ("ADA"). Petitioner's Appendix E. Petitioner's lawyer advised the EEOC in writing that she informed Petitioner of the ADA charge during her first meeting with him on September 27, 1999.[4] *Id.* Petitioner's lawyer also claimed that Respondent's statement to the EEOC in response to his race/sex/retaliation charge – that "Ron's answers to

[4] Given Petitioner's prior charge and lawsuit against Respondent in which he claimed a disability, "speech," and discrimination pertaining thereto, it is unlikely in the extreme that Petitioner failed to recognize all bases for his 1998 charge of discrimination.

some of the interview questions tended to ramble and he repeated himself several times on answers to questions" – indicated a decision based on a potential ADA violation. *Id.* Notwithstanding the untimely request to amend a charge, the EEOC on October 6, 1999, went ahead and vacated the Dismissal of Notice of Rights dated July 6, 1999. *Id.* On November 20, 1999, Petitioner filed a statement with the EEOC expressing his desire "to amend this charge to include being denied promotion because of disability, as defined by, and covered under, the Americans with Disabilities Act." *Id.* Thereafter, the EEOC issued a new Dismissal and Notice of Rights dated November 26, 1999. *Id.* Petitioner filed a lawsuit on February 22, 2000, in the United States District Court for the Eastern District of Texas.

During the course of the litigation, it was announced that Chevron U.S.A. Inc. and Phillips Petroleum Company intended to combine the chemical operations into one company. As a result of this decision, Chevron began reorganizing its workforce, recognizing that one combined company would not require the staffing of two workforces. These efforts to reorganize and streamline operations led to a reduction-in-force. Petitioner was one of many employees selected for layoff.

To diminish the number of employee layoffs, however, Respondent undertook a "redeployment process." This process endeavored to assist employees subject to layoff (i.e., surplus employees) with the identification and placement into any existing and vacant positions within the various Chevron companies. Respondent, therefore, attempted to identify and place several surplus employees, including Petitioner, in several lab openings in its Cedar Bayou, Texas Chemical Plant and its Kingwood, Texas

technology facility. Respondent did not select Petitioner for the Kingwood and Cedar Bayou positions. Respondent informed Petitioner in July 2000 that he did not receive the Kingwood or Cedar Bayou positions.[5]

Petitioner responded to the disappointing news as he always responded: he sought leave in August 2000 to file an amended complaint, claiming that the failure to transfer Petitioner to Cedar Bayou or Kingwood was "additional discrimination and retaliation." Appendix C. On December 22, 2000, Petitioner *again* sought leave to amend the complaint for the purpose of including alleged facts that he claimed to discover following the grant of leave to file his Second Amended Complaint. *Id.* In this newest Request for Leave to amend his Complaint, Petitioner stipulated to the Court that the "Third Amended Complaint *does not assert a new cause of action. . . .* "[6] *Id.* (emphasis added). While Respondent did not file oppositions to such motions,[7]

---

[5] The comments referenced by Petitioner in the Petition made by Nethery in his notes (i.e., that Petitioner talked slow and rambled) do not demonstrate that Nethery knew that Petitioner stuttered or that he had a discriminatory animus. Petitioner admitted that the word "rambling" means "mindless chatter." Likewise, that Nethery believed Petitioner spoke slowly in no way translates into "stuttering"; indeed, Nethery testified he heard no stuttering.

[6] Accordingly, based on the Motions for Leave, it appears (contrary to that represented to this Court in Note 5 of Petitioner's Petition), if anything, Petitioner added the discrimination claim in August 2000, and added alleged additional facts to support such claims in December 2000. *See* Appendix C.

[7] At that time, Respondent had no basis to oppose an amendment because it could not show prejudice, futility (i.e., that such claim would not withstand a motion to dismiss), or lack of diligence. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962); *Phelps v. McClellan*, 30 F.3d 658, 662-63) (6th Cir. 1994); *Brunt v. Service Employees Int'l Union*, 284 F.3d 715, 720 (7th Cir. 2002); *Southmark Corp. v. Schulte Roth & Zabel*

(Continued on following page)

Respondent timely filed answers with the defense that Petitioner's claims were barred, in whole or in part, due to the applicable statute of limitations and/or failure to exhaust or timely exhaust administrative remedies.

In Respondent's Motion for Summary Judgment, it addressed *all* of Petitioner's claims of employment discrimination and retaliation under Title VII and the ADA, including any possible new disability claim.[8] Because 300 days passed without Petitioner filing a charge of discrimination pertaining to the transfer positions, Respondent added a "failure to exhaust administrative remedies" and "statute of limitations" argument when it filed its Reply to the Response to the Motion for Complete Summary Judgment effective June 5, 2001.[9] On June 14, 2001, and September 7, 2001, the Court granted Respondent's Motion for Complete Summary Judgment and dismissed the case with prejudice.

(In re Southmark Corp.), 88 F.3d 311, 315-16 (5th Cir. Tex. 1996). Failure to file a charge is not a jurisdictional issue, but a limitations issue. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, Respondent properly filed amended answers, inserting therein the defense that Petitioner's claims were barred, in whole or in part, by applicable statute of limitations and/or failure to exhaust or timely exhaust administrative remedies.

[8] Respondent addressed all possible claims out of an abundance of caution, notwithstanding Petitioner's counsel's stipulation on the record in Nethery's deposition and in another witness' depositions in November and December 2000 that Petitioner brought *only retaliation claims* with respect to the 2000 Kingwood and Cedar Bayou lateral transfer positions.

[9] Respondent did not assert this claim earlier because it did not mature until a date following its summary judgment motion filing deadline.

ARGUMENTS AND AUTHORITIES

RESPONDENT'S REASONS FOR DENYING THE WRIT

I. PETITIONER DID NOT ARTICULATE A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

Under Rule 10, a review of a writ of certiorari is not a matter of right, and will be granted subject to this Court's discretion for compelling reasons. Petitioner has not articulated a compelling reason to justify discretionary review by this Court. This case does not present a situation in which a United States court of appeals entered a judgment in conflict with decisions of other United States courts of appeals on an important matter, or an important federal question. With the exception of *one* 1982 Eighth Circuit case, the courts of appeals have been consistent in the decisions concerning when an amendment to an EEOC charge relates back to a timely-filed charge of discrimination. Moreover, there is no dispute when it comes to the application of equitable tolling when a party fails to file or timely file a charge of discrimination with the EEOC. As such, Petitioner presented no compelling reason for this Court to exercise discretionary jurisdiction over the appeal of the United States Fifth Circuit Court of Appeals decision. Indeed, this Court has previously denied a similar Petition for Writ of Certiorari in *Simms v. State of Oklahoma*, 528 U.S. 815 (1999).

II. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION IS CONSISTENT WITH THE APPLICATION OF THE RELATION-BACK DOCTRINE AND DOES NOT VIOLATE STATUTORY OR REGULATORY AUTHORITY.

In a deferral state such as Texas, a plaintiff must exhaust administrative remedies by filing a charge of disability discrimination within 300 days of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); 42 U.S.C. § 12117(a). Failure to file a charge within the 300-day period generally renders the charge untimely and any subsequent claim in a lawsuit is barred by limitations. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995); *see also McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986, 1000 (D. Minn. 1999).

However, 29 C.F.R. § 1601.12(b) provides that certain amendments to a charge of discrimination may "relate back" to the filing date of the original charge, rendering the amendment timely even when the amendment is filed after the statutory deadline. To "relate back," the amendment must (i) cure technical defects or omissions, including failure to verify the charge,[10] *or* clarify and amplify allegations made therein;[11] *and* (ii) allege additional acts

---

[10] In general, a "technical" defect is correcting a name or address or verifying a charge. Alterations to the legal theory, on the other hand, goes to the *substance* of the charge. *See, e.g., Simms v. Oklahoma Ex Rel. Dept. of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 n. 1 (10th Cir. 1999); *see also Hornsby*, 777 F.2d at 247 (noting that addition of a new and independent charge of sexual harassment and new and independent facts to support claim are more substantive than merely to cure technical defects).

[11] An amended charge does not "clarify or amplify allegations" of the original charge where the original charge makes no mention of the

(Continued on following page)

related to or growing out of the subject matter of the original charge. 29 C.F.R. § 1601.12(b).

The courts of appeal narrowly apply this relation-back doctrine, finding that allegations of *new and independent charges* with *new and independent facts* contained in an amended charge go to the substance of the charge and thus *do not relate back* to the filing of the original charge. *See, e.g., Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962-964 (4th Cir. 1996) (claim of *age* discrimination does not flow from claim of *sex* discrimination); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247-48 (5th Cir. 1985) (claim of *sexual harassment did not relate back* to charge of *age* and *sex* discrimination);[12] *EEOC v. Mississippi College*, 626 F.2d 477, 483-84 (5th Cir. 1980) (allegations of *racial discrimination* do not relate to or grow out of allegations of *sex discrimination* advanced in original charge and therefore do not relate back); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (relation-back appropriate wherein court characterized the plaintiff's failure to check the "national origin" box on the

---

theory or the facts alleged in the amended charge. *See, e.g., Simms*, 165 F.3d at 1326.

[12] The Fifth Circuit Court of Appeals' decision in this case does not conflict with *Sanchez* or *Hornsby*. In this case, Petitioner neither checked the disability box nor alleged facts in the original charge to put the EEOC or Respondent on notice of an allegation of disability discrimination. *See Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 879 (5th Cir. 2003) ("Manning misunderstands the import of our precedent. The issue is not whether the employee *adds* any facts when he amends his charge of discrimination. Instead, the question is whether the employee *already included* sufficient facts in his original complaint to put the employer on notice that the employee may have additional allegations of discrimination.")

Charge form as a "technical defect" after it examined the factual statement contained within the Charge and found it raised national origin); *Fairchild v. Forma Sci.*, 147 F.3d 567 (7th Cir. 1998) (*disability* discrimination charge did not relate back to original *age* discrimination charge, particularly given that no facts to support claim of disability discrimination included in the original charge); *Leong v. Potter*, No. 02-16856, 2003 WL 22439875 *2 (9th Cir. Oct. 29, 2003) (dismissing pleading amendment of disability discrimination claim for failure to satisfy administrative prerequisites: plaintiff's "disability claim relies on a different theory and a different statute than his other claims. Disability discrimination was not investigated by the EEOC, and such an investigation could not have been expected to grow out of [the plaintiff's] charges. Nothing in [plaintiff's] affidavit would have led the EEOC to suspect that he was disabled or had been subjected to disability discrimination."); *Simms v. Oklahoma*, 165 F.3d 1321, 1326-1328 (10th Cir. 1999) (amendment to charge adding retaliation claims, including withholding supervisory duties and failure to promote, did not (i) clarify or amplify allegations in original charges where original charge made no mention of theory or facts alleged in amended charge, or (ii) relate to or grow out of prior charge because it claims a new theory of recovery, retaliation, that were not raised in the prior charge), *cert. denied*, 528 U.S. 815 (1999); *see also Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 395 (5th Cir. 2000) (charge of gender discrimination did not encompass charge of race discrimination). *But cf. Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (allowing relation back of amended charge of race discrimination to original charge of sex discrimination, but substance of second charge was partially asserted in first charge).

As shown above the courts of appeals consistently find that allegations of *new and independent charges* with *new and independent facts* contained in an amended charge go to the substance of the charge and do not relate back to the filing of the original charge. These findings are consistent with the legislative purpose of filing a charge of discrimination: "Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period – giving the employer notice and providing opportunity for administrative investigation and conciliation." *Simms*, 165 F.3d at 1327; *see also Fairchild*, 147 F.3d at 575.

Notwithstanding the clear and unequivocal statement of the law governing the relation-back theory, Petitioner argues that the notice requirement is met if (i) the employee lists the date, place and circumstances of the alleged unlawful employment act; and (ii) the employer knows of a potential disability allegation. As a starting point, it is undisputed that neither Respondent nor the EEOC was aware of any alleged disability allegation prior to Petitioner's untimely request to amend.[13] In any event, to accept Petitioner's argument: (i) turns every EEOC

[13] Petitioner claims Respondent knew of such an allegation because it submitted to the EEOC the form that *Petitioner* completed in connection with his request for the T-1 position. Respondent proved, however, during the litigation that the decisionmakers lacked knowledge of *Petitioner's* statement concerning the ADA. Regardless, this form belies Petitioner's assertion that he lacked knowledge of his ADA claim and thus is excused from asserting it timely in a charge. If Petitioner did not know of an alleged disability claim after he attempted to notify Respondent of his alleged stuttering impairment, he cannot expect the EEOC or Respondent to read his race/sex/retaliation charge as one involving disability.

charge, regardless of the content, into a license to inject untimely separate and independent charges against an employer unfettered by the administrative exhaustion requirements of the ADA; and (ii) automatically triggers in every EEOC charge every prohibited category of discrimination, regardless of how detailed and limited the plaintiff's factual allegations are stated. This logic defeats the purpose of the charge of discrimination. *Leong*, 2003 WL 22439875 at *3 ("A decision that an EEOC complaint with no mention whatsoever of disability is 'like or reasonably related to' [plaintiff's] disability claim would reduce the exhaustion requirement to a formality.").

Accordingly, this Court should deny Petitioner's Petition, as it is undisputed that the courts of appeal consistently apply the relation-back doctrine, and Petitioner's *new and independent* charge of disability discrimination in the amended charge of discrimination did not relate back to the filing of the original charge and is time-barred.

III. THE EQUITABLE TOLLING DOCTRINE IS CONSISTENTLY APPLIED, AND IS NOT APPLICABLE IN THIS CASE.

As noted by Petitioner, there is a limited exception for the failure to file a charge of discrimination: A civil complaint may properly encompass any discrimination like or reasonably related to allegations of the EEOC charge and growing out of such allegations. *See, e.g., Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *see also Simms*, 165 F.3d at 1327. This "reasonably related" exception includes claims of most retaliatory acts allegedly occurring *subsequent* to the filing of an EEOC charge. *Id.* However, charges are not reasonably related simply because they

assert the same type of discrimination. *Cheek v. Western & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994). Rather, the charges must, at a minimum, describe the same conduct and implicate the same individuals. *Id.* Because this limited exception is generally recognized in retaliation claims arising after a charge is filed, *see, e.g.*, *McKenzie v. Illinois Dept. of Trans.*, 92 F.3d 473 (7th Cir. 1996), Respondent did not claim that Petitioner's new retaliation claim was time-barred.

Petitioner's disability, race and sex discrimination claims with respect to the 2000 lateral positions, however, implicated *different* decisionmakers and *different* discrimination claims, and therefore are not reasonably related. *Cf. Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 984 (10th Cir. 1991) (charge filed with EEOC of discrimination regarding 1986 disciplinary action and 1988 termination did not permit challenge to 1979 nonpromotion); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (claim of racial harassment not preserved when EEOC charge pertained to earlier time period, only asserted discriminatory failure to promote, and referred to different employees). Accordingly, the discrimination claims relating to the 2000 lateral transfer positions are time-barred absent a showing by Petitioner of equitable tolling or estoppel.

As noted by this Court, the charge filing deadline and requirement is subject to equitable doctrines such as estoppel or tolling. *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2072 (2002). "These equitable doctrines allow us to honor Title VII's [and therefore the ADA's] remedial purpose 'without negating the particular purpose of the filing requirement, to give prompt notice to the employer.'" *Id.* at 2076. However, these equitable

doctrines "are to be applied sparingly" and must be proved by the party invoking equitable tolling. *Id.* at 2072; *see also Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002). As acknowledged by this Court in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 112 L.Ed.2d 435, 111 S. Ct. 453 (1990),

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Id. at 457-58 (*citing Burnett v. New York C. R. Co.*, 380 U.S. 424, 85 S. Ct. 1050 (1965) (plaintiff timely filed complaint in wrong court); *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959) (adversary's misrepresentation caused plaintiff's failure to file timely)).

Petitioner's blaming of Respondent for his failure to satisfy the administrative prerequisites lacks merit and is insufficient as a matter of law to satisfy the equitable tolling doctrine. Equitable tolling is appropriate when, despite all due diligence, the plaintiff is able to prove an inability to discover on a timely basis essential information bearing on the existence of his claim. *See, e.g., Pacheco v. Rice*, 966 F.2d 904, 906-907 (5th Cir. 1992); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 n. 14 (5th Cir. 1991). The equitable tolling doctrine operates to stop the limitations clock until the time in which the facts (but not all facts) supporting a cause of action are

or should be apparent. *See Blumberg v. HCA Management Co.*, 848 F.2d 642, 645 (5th Cir. 1988). Petitioner sought leave on August 18, 2000, to amend his lawsuit for the purpose of adding claims concerning the 2000 Kingwood and Cedar Bayou lateral transfer positions, and the court granted leave on August 22, 2000. Accordingly, no later than August 18, 2000, Petitioner knew the facts that he believed supported his claims concerning the 2000 lateral transfer positions by August 18, 2000. Petitioner failed to file a charge of discrimination within 300 days of August 18, 2000, and is therefore barred from asserting an ADA claim.

Likewise, Petitioner's plea of ignorance concerning the statutory preconditions for filing a discrimination lawsuit is contradicted by the record evidence, which reveals his prior litigation against Respondent based on claims of discrimination. To be sure, his own attorney sought to amend his *1998* charge of discrimination to include disability discrimination in an unsuccessful effort to preserve his 1998 disability claim. And notwithstanding his plea of ignorance, a cursory examination of the case law reveals that ignorance alone is not excusable. It is well-settled that discrimination claims that arise after the filing of a charge of discrimination and do not arise out of or relate to the same claims are not viable without the filing of a charge of discrimination – period.[14] Petitioner is deemed to

[14] Any contention that Petitioner's counsel was duped by Respondent's actions in this litigation is absolutely untrue. It is not Respondent's duty to provide legal advice to Petitioner's counsel. In defending the litigation, Respondent complied with the Federal Rules of Civil Procedure: Respondent could not assert that the claim was time-barred until it was time-barred.

have knowledge of this case law, as "[c]onstructive knowledge of a time limit will usually be imputed when the plaintiff retains a lawyer within a limitations period." *Weigel v. Baptist Hosp. of East Tennessee*, 302 F.3d 367, 376 (6th Cir. 2002). Equitable tolling is not appropriate under these circumstances. *See, e.g., Irwin*, 111 S. Ct. at 458 (dismissing petitioner's argument that failure to timely file should be excused because his lawyer was absent from the office when the EEOC notice was served and that he filed within 30 days after he received personal notice, stating "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect."); *Cruce v. Brazosport Indep. Sch. Dist.*, 703 F.2d 862 (5th Cir. 1983) (claimed ignorance of Title VII procedures negated by representation prior to the filing of the lawsuit).

CONCLUSION

For the reasons stated in this Brief in Opposition to the Petition for a Writ of Certiorari, Respondent, Chevron Chemical Company, LLC, requests that Petitioner's Petition be denied.

Respectfully submitted,

HOLLY H. WILLIAMSON
TARA B. HITTELMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
711 Louisiana, Suite 1900
Houston, Texas 77002
(713) 220-5800 (telephone)
(713) 236-0822 (facsimile)

Attorneys for Respondent Chevron Chemical Company, LLC

APPENDIX A

CHARGE INFORMATION FORM EEOC HOUSTON DISTRICT OFFICE	For EEOC Use Only	
	Intake Officer	0188

Today's Date 10/26/98 Social Security Number 459-90-0415

Name Ronald Howard Manning
(First) (Middle) (Last)

Home Telephone (409) 835-5906
(Include Area Code)

Address 4390 Ector Ave Apt. No.

Work Telephone (409) 882-6836

City Beaumont State TX Zip Code 77705 County Jefferson

Date of Birth 1-16-50 Race African American Sex Male

Provide Information about an individual who does not live with you who would be able to contact you at any time.

Name

Address REDACTED

City

Provide name and address of the company that has allegedly discriminated against you.

Name Chevron Chemical Company

Telephone (409) 727-1471 or 886-7491

Address P.O. Box 7400

City Orange, TX State TX Zip Code 77631-7400

Company head official's name and title Ken Derr; Chairman of the Board CEO

Approximate number of employees 39,000

Your job title Testing Technician

What type of business is this

Oil Refining and Plastics Manufacturing

Does this company have more than one office or location?

Yes ✓ No ____

Do you believe that you have been discriminated against because of your race, color, national origin, religion, sex, age, or disability ? Yes If yes, describe below:

Race, Sex. I have filed charges with the EEOC twice before. After the first filing, the company settled; after the second filing, I lost. No black males in my dept (area) have been promoted.

Have you filed an EEOC charge in the past?

Yes ✓ No ____ (If yes, complete below)

Approximate Date Filed 6/90 & – 12/93

Charge Number (If Known) ____

Company against which you filed your charge Chevron Chemical

Results of your charge?

Settlement first time; I lost the Second time.

I believe I was discriminated against by being (describe how you have been harmed):

Not promoted when a white employee was promoted in line with the way the previous two positions (T1) were filled. A committee procedure was used this time, but not ~~at first~~ the first time. [Illegible] The committee procedure was used sometimes then, I believe.

On what date did you learn that the company took this action against you? 6/16/98

Who caused the harm (Include name, title, race or national origin, sex, age, etc.) Kevin Cable, Shift Supervisor – Techlab, white, male, 33 yrs old & the other selection team

Did a company representative tell you why this action was taken? If yes, what was the reason given for the harm? I was informed of the selections verbally by Porter Shannon, my immediate supervisor

Who informed you of this reason? _____

Were you given any of this information in writing?

Yes ____ No ✓

Why do you believe the harm or action taken against you was discriminatory? Because of my gender; the fact that I've sued before; my race; no black male, in the 21 years plus that I've worked there, has been promoted in my department.

Identify by name, title, race or national origin, sex, age, etc., others who were treated more favorably or better than you in the same or similar situation. Donnie Mires, Harold Hear, and Fred Noyes

Does your employer have an internal grievance procedure or is there a union? Yes ✓ No ____

If yes, did you file an internal grievance and what was the outcome? No, it is new and I have copy of it here

Have you discussed this problem with an attorney or other agency? Yes ✓ No ____ If yes, complete below.

Name and source of assistance _____

Results, if any, I was told to come to the EEOC first

Signature Date

PRIVACY ACT STATEMENT

This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below. 1. **AUTHORITY**, 42 U.S.C. §2000e-5(b), 29 U.S.C. §211, 29 U.S.C. §626. 2. **PRINCIPAL PURPOSE**. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction. 3. **ROUTINE USES**. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints, or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other state, local and federal agencies as may be appropriate or necessary to carry out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation. 4. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is mandatory that this form be used to provide the requested information.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD MANNING	§	
VS.	§	CIVIL ACTION NO.
	§	1:95CV091
CHEVRON CHEMICAL	§	
COMPANY	§	

ORIGINAL COMPLAINT

(Filed Feb. 21, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Plaintiff, RONALD MANNING is a resident of the Eastern District of Texas. Defendant, CHEVRON CHEMICAL COMPANY, may be served with process pursuant to the Federal Rule of Civil Procedure, Rule 40 (4)(4) by delivering a copy of the Summons and Complaint to the Defendants Agent for Service of Process, Prentice Hall Corporation System, 400 N. St. Paul Street, Dallas, Texas 75201, by forwarding to Defendant's Agent Registered Mail Return Receipt Request.

II.

Jurisdiction of this court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 United States Code Sections 2000e et seq, Title 28 United States Code, Section 1343(3), (8), 2201 and 2202. This action is further brought under the Americans with Disabilities Act of 1990 ("ADA"),

Title 42 United States Code 12101 et seq. This action is also brought pursuant to the Thirteenth Amendment of the United States Constitution to redress the deprivation of rights, privileges, and immunities secured thereby. This action is also brought pursuant to Title 42 United States Constitution Sections 12101 et seq, 2000e et seq, and 1981, to secure the rights of Plaintiff to be free from discrimination in employment on the basis of race, discrimination in employment on the basis of handicap/disability, and to secure Plaintiff's right to make and enforce contracts on the same basis as white citizens.

III.

This is a suit for damages and for injunctive and other affirmative relief against discrimination, which discrimination is violative of the Americans with Disabilities Act, a body of slavery unlawful under the Thirteenth Amendment of the U.S. Constitution, Title 42, United States Code, 12101 et seq, 42 United States codes 2000e et seq. Plaintiff has received his authorization to sue from the Equal Employment Opportunity Commission, and this suit was filed within ninety (90) days of receipt of said authorization to file suit.

IV.

Plaintiff, RONALD MANNING, is a Black, Disabled male citizen of the United States of America, who is a resident of the East District of Texas.

V.

The discriminatory actions violative of the Americans with Disabilities Act, 42 United State Code, Section 12101 et seq, 42 United States Code, Sections 1981, 1983, and 2000e et seq, and the Thirteenth Amendment, alleged herein were all committed within the State of Texas, Eastern District of the United States, Beaumont Division.

VI.

Defendant, CHEVRON CHEMICAL COMPANY, is a corporation operating under the laws of the State of Texas and County of Orange, is qualified to do business in the State of Texas and is doing business in the State of Texas.

VII.

Defendant, is an employer engaged in industry, affecting interstate commerce and employs twenty-five (25) employees, for each working day and each of twenty (20) or more calendar weeks in the current or preceding year.

VIII.

On or about December 1, 1993, Plaintiff was denied promotion to the position of Lab Shift Supervisor after having applied for same. Plaintiff alleges that his denial and/or rejection of the promotion was based upon his Disability, "speech", race, Black and that he was subjected to both Disability and Race based Discrimination during the evaluation procedure instituted by the Defendant in order to be considered for the Promotion. Plaintiff further alleges he was subjected to disparate treatment, the

employment testing resulted in a Disparate Impact upon Plaintiff, and due to such treatment Plaintiff was past over for the promotion. Also, other Caucasian and non-Disabled employees of the Defendant have not been treated in a similar fashion and not held to the same standard. Plaintiff notified persons of higher authority at his employment of the Discriminatory nature of the Defendant's actions. Defendant has failed or refused to take remedial action.

IX.

Plaintiff further believes and alleges that he was subjected to discrimination and disparate treatment for no other reason than his Disability and Race all in violation of Title 42 United States Code, Section 12101 et seq, 2000e et seq, 1981, 1983 and the Thirteenth Amendment of the United States Constitution.

X.

Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs as alleged, and this suit for injunctive relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from Defendant's Discriminatory practices, procedures, practices, customs, and usages as set forth herein in paragraph VII and VIII until and unless enjoined by this Court.

XI.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, RONALD MANNING, prays this Court advance this case

on this docket, order a speedy hearing at the earliest practicable date, cause this case to be expedited, and on such hearing to this Court, that this Court;

1. Enter a Declaratory Judgment that the practices complained of herein are unlawful and violative of the Americans with Disabilities Act, 42 United States Code, Section, 12101 et seq, Title VII of the Civil Rights Act of 1964, and 42 United State Code, Section 2000e et seq., and 1981;

2. Permanently enjoin Defendant, its agents, assigns, successors, officers, employees, attorneys and those acting in concert with it or them from engaging in each of the unlawful practices, policies, procedures, customs, and usages set forth herein, and from continuing any and all other such practices shown to be in violation of applicable law;

3. Order elimination or modification of practices, procedures, policies, customs, and usages set forth herein and all other such practices shown in violation of applicable law so that they do not discriminate on the basis of race or physical disability;

4. Immediately promote Plaintiff to that job he would now be occupying but for the discriminatory practices of Defendant, and adjust the wage rates, salaries, bonuses, benefits and prerequisites for Plaintiff to that level he would now be enjoying but for the discriminatory practices of Defendant;

5. Award Plaintiff compensation and backpay for such period of time when Plaintiff was denied or past over for promotion until the present;

6. Award monetary damages to Plaintiff to his mental anguish and emotional distress;

7. Award monetary damages to Plaintiff for his intangible losses;

8. Award Plaintiff the costs and disbursements of this action, including reasonable attorney's fees; and

9. Grant each other relief as he may be justly entitled.

RESPECTFULLY SUBMITTED,

/s/ Kent W. Johns
KENT W. JOHNS
1635 Washington Blvd.
Beaumont, Texas 77705
(409) 833-2233
(409) 833-4226 FAX#
TBA# 10675800

ATTORNEY FOR PLAINTIFF

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD H. MANNING	§	**CIVIL ACTION NO.**
PLAINTIFF	§	**1:00CV-143**
VS.	§	**JURY TRIAL DEMANDED**
CHEVRON CHEMICAL COMPANY, LLC	§	
DEFENDANT.	§	

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED PLEADING

(Filed Aug. 18, 2000)

Comes now, Ronald H. Manning, Plaintiff, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and files his Motion for leave to file an amended pleading and would show:

1. Plaintiff filed his Original Complaint on February 24, 2000. Defendant filed its Original Answer on or about March 24, 2000. Defendant filed its Amended Answer on or about April 3, 2000. Plaintiff requested leave of court to amend his Original Complaint on June 8, 2000. The motion for leave of court was granted and the Plaintiff's First Amended Complaint filed on June 12, 2000.

2. Plaintiff alleges further offenses by Defendant in light of new facts occurring after the first amended complaint which further support the allegations against Defendant

Chevron Chemical Company. Specifically in July 2000, Plaintiff was informed that he would be terminated on September 1, 2000, pursuant to a reduction in force. Since July 2000, Defendant has applied for other lateral transfer positions within the Chevron Chemical Company. Defendant has denied Plaintiff approximately fourteen (14) lateral transfer positions to the other surrounding plants of Defendant. Plaintiff alleges that the failure to transfer him after his termination is additional discrimination and retaliation by Defendant in response to Plaintiff's existing claim.

3. The amendment to the pleading is to expand the breadth of the pleading to include facts occurring after the first amendment of the pleading. The amendment does not assert a new cause of action, and does not alter the nature of the trial.

4. Attached hereto as Exhibit "A" for conditional filing is Plaintiff's Second Amended complaint.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that this Court:

1. Grant his Motion for Leave to File Amended Pleading;

2. Order the Clerk to accept and file Plaintiff's Second Amended Complaint included with this Motion; and

3. Grant Plaintiff any further relief to which he may be entitled.

Respectfully submitted,

/s/ Victoria L. Plante
VICTORIA L. PLANTE
Texas Bar No. 00798436
River Oaks Tower
3730 Kirby, Suite 901
Houston, Texas 77098
Telephone: (713) 526-2615
Facsimile: (713) 520-6853

ATTORNEY-IN-CHARGE FOR
PLAINTIFF RONALD H. MANNING

CERTIFICATE OF SERVICE

I, Victoria L. Plante, hereby certify that a true and correct copy of the foregoing Plaintiff's Motion for Leave to File Amended Pleading has been forwarded on this the 18th day of August, 2000, via hand delivery to:

Holly H. Williamson
Tara B. Hittelman
Littler Mendelson, P.C.
1301 McKinney, Suite 1900
Houston, Texas 77010
ATTORNEYS FOR DEFENDANT

/s/ Victoria L. Plante

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD H. MANNING	§	**CIVIL ACTION NO.**
PLAINTIFF	§	**1:00CV-143**
VS.	§	**JURY TRIAL DEMANDED**
CHEVRON CHEMICAL COMPANY, LLC	§	
DEFENDANT.	§	

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED PLEADING

Comes now, Ronald H. Manning, Plaintiff, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and files his Motion for Leave to File an Amended pleading and would show:

1. Plaintiff filed his Original Complaint on February 24, 2000. Defendant filed its Original Answer on or about March 24, 2000. Defendant filed its Amended Answer on or about April 3, 2000. Plaintiff requested leave of Court to amend his Original Complaint on June 8, 2000. The motion for leave of court was granted and the Plaintiff's First Amended Complaint filed on June 12, 2000. Plaintiff requested leave of Court to File Plaintiff's Second Amended Complaint on August 18, 2000. The Court granted leave on August 22, 2000.

2. Plaintiff alleges further claims against Defendant in light of new facts discovered during Plaintiff's six (6) depositions of Defendant's employees that were taken after Plaintiff's Second Amended Complaint was filed.

3. The amended to the pleading is to expand the breadth of the pleading to include facts discovered after Plaintiff Second Amended Complaint was filed. Plaintiff's Third Amended Complaint does not assert a new cause of action, and does not alter the nature of the trial.

4. The deadline to request leave of court to file amended pleadings is December 26, 2000.

5. Attached hereto as Exhibit "A" for conditional filing is Plaintiff's Third Amended Complaint.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that this Court:

1. Grant his Motion for Leave to File Amended Pleading;

2. Order the Clerk to accept and file Plaintiff's Third Amended Complaint included with this Motion; and

3. Grant Plaintiff any further relief to which he may be entitled.

Respectfully submitted,

/s/ Victoria L. Plante
VICTORIA L. PLANTE
Texas Bar No. 00798436
River Oaks Tower
3730 Kirby, Suite 901
Houston, Texas 77098
Telephone: (713) 526-2615
Facsimile: (713) 520-6853

ATTORNEY-IN-CHARGE FOR
PLAINTIFF RONALD H. MANNING

CERTIFICATE OF SERVICE

I, Victoria L. Plante, hereby certify that a true and correct copy of the foregoing Plaintiff's Motion for Leave to File Amended Pleading has been forwarded on this the 22nd day of December, 2000, by certified mail, return receipt requested, to:

Holly H. Williamson
Littler Mendelson, P.C.
1301 McKinney, Suite 1900
Houston, Texas 77010

ATTORNEYS FOR DEFENDANT

/s/ Victoria L. Plante